Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

JOHN ERIC THOMAS, *et ux* HEATHER THOMAS,
Petitioners,

v.

THE CITY OF CHATTANOOGA, TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did not the Sixth Circuit panel err in holding that the opinions of plaintiffs' expert on the dispositive issue of the existence of a pattern, practice or conduct permitting the use of excessive force by police officers was inadmissible by virtue of the standards articulated by the United States Supreme Court in *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties involved are named in the caption. There are no parent companies nor any nonwholly owned subsidiaries within the meaning of Supreme Court Rule 29.6.

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The Opinion of the United States Court of Appeals for the Sixth Circuit was recommended for full-text publication. It is reported at 398 F.3d 426 (6th Cir. 2005).

JURISDICTIONAL STATEMENT

1. The United States Court of Appeals for the Sixth Circuit issued its written opinion on February 9, 2005.

2. There is no Order respecting rehearing, nor is there any Order granting an extension of time to file the petition for a writ of certiorari.

3. Supreme Court Rule 12.5 is not applicable to this petition for the writ of certiorari in that this is a petition for the writ of certiorari predicated on errors made by the United States Court of Appeals for the Sixth Circuit. The statute conferring United States Supreme Court jurisdiction over the instant controversy is believed by the petitioners to be 28 USC § 1252.

4. In that neither the United States nor any department thereof is a party to these proceedings, the provisions of Supreme Court Rules 29.4[b] and [c] are not applicable.

STATUTES AND FEDERAL RULES INVOLVED IN THE CASE

Federal Rule of Evidence 401. Definition of "Relevant Evidence." "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 402. Relevant Evidence Generally Admissible ; Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Federal Rule of Evidence 702. Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if [1] the testimony is based upon sufficient facts or data, [2] the testimony is the product of reliable principles and methods, and [3] the witness has applied the principles and methods reliably to the facts of the case.

42 USC § 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law... [elided].

STATEMENT OF THE CASE

Federal jurisdiction in the United States District Court for the Eastern District of Tennessee was founded on 28 USC § 1331, in that this is a suit for money damages occasioned by personal injury predicated on 42 USC § 1983. The *gravamen* of Mr. and Mrs. Thomas' claim against the City of

Chattanooga was and is that at the time Mr. Thomas was shot in the back by a Chattanooga policeman at what was tantamount to point-blank range, the City of Chattanooga had in effect an unwritten but clearly understood policy, practice, or custom permitting the use of excessive, deadly force.

A. The Shooting of Eric Thomas.

It is important to keep in mind that the facts surrounding Mr. Thomas' shooting are wholly undisputed in the record. On the evening of May 27, 2002, Eric Thomas and his wife, Heather, were in the kitchen of their home in Chattanooga. Mr. Thomas was in the process of putting away several firearms that he owned lawfully. Mr. Thomas had arrived home a short time earlier with the muffler on his truck dragging, which annoyed him, and he had complained loudly.

Apparently, a neighbor of the Thomas' heard Mr. Thomas cursing his muffler and perhaps because Mr. Thomas and his father had engaged in a brief argument on the premises earlier that day, reported a disturbance at the Thomas' home to the Chattanooga police. Officer Reginald Abernathy was first on the scene, and he was alone. He knew nothing of any events earlier in the day. Officer Abernathy "heard screaming" as he approached the Thomas' home and he "felt it was toward each other" although he could not tell what was being said. At this point, he was about halfway between his police car and the Thomas' home. Officer Abernathy then walked to the Thomas' back porch, and looked through the glass, or top, portion of the kitchen door. At that time, he heard absolutely nothing. He saw a woman (Mrs. Thomas) facing a man (Mr. Thomas). He believes that they were 2½-3 feet apart. He saw Mr. Thomas with a firearm in each hand, and Mr. Thomas' back was toward Officer Abernathy. Officer Abernathy says that he saw Mr. Thomas move "*like* he was turning."

Although Officer Abernathy was immediately outside the kitchen door and "It looked like Mr. Thomas said something," Officer Abernathy heard nothing at all. Based on these facts and these alone, Officer Abernathy somehow concluded that Mrs. Thomas was "in imminent danger." Officer Abernathy reached that startling conclusion based ONLY upon "her [Mrs. Thomas'] expression and body language." Officer Abernathy does not know where Mrs. Thomas – the person he says he believed was in imminent danger – was standing immediately before he opened fire but believes that she was between one and three feet from the kitchen door. Immediately before he fired, Officer Abernathy could see that the firearm in Mr. Thomas' left hand was still pointed downwards, but he could not tell about the "angle" of the firearm in Mr. Thomas' left hand. At that point, Officer Abernathy shot Mr. Thomas seven times in one continuous sequence from a range of between five and eight feet. Even though the Police Department's written regulations (exhibited to Captain Crumley's deposition, *infra, inter alia*), require the contrary, Officer Abernathy never stopped shooting in order to re-evaluate the situation. Before opening fire on Eric Thomas, Officer Abernathy never identified himself as a policeman; he never shouted "Stop!" or anything similar; in fact, he never announced himself at all. Officer Abernathy never heard Mr. Thomas threaten his wife , or threaten Officer Abernathy. Upon more rigorous questioning, Office Abernathy described what he had earlier characterized as Mr. Thomas beginning to turn as "swaying movement." Officer Abernathy said that just before he fired, Mr. Thomas was "...getting ready to turn..." towards Mrs. Thomas. Near the end of his deposition, Officer Abernathy gave the following as his reason for opening fire on Mr. Thomas:

> "Because we were there on a disorder, and after she started backing up -- are you talking about the -- after

she started backing up, it was a concern to me because I felt she felt her life was in danger."

In other words, Officer Abernathy, without giving any warning at all, shot Eric Thomas in the back at least seven times from a distance of no more eight feet because he somehow concluded that since Mrs. Thomas was "backing up" she must have thought her husband was about to kill her.

Heather Thomas' version of this tragedy is much more succinct. She testified that as her husband was walking down their hall to put away the firearms that he had with him, she heard someone at their back door, and a dog barking. As she went to see who was at the back door, gunshots were fired through the glass window in the kitchen door. When he was shot, Mr. Thomas was walking away from his wife, with his back turned, one firearm in each hand, both pointed downward. No turning, no "swaying," just walking away. And then he was shot.

Analysis of Captain Crumley's eventual conclusion that Officer Abernathy acted reasonably, and within the meaning of the Police Department's written deadly force requirements (*infra*), requires careful scrutiny of what was occurring at the time that Abernathy commenced firing. Officer Abernathy testified that Eric Thomas was "facing down the hall" with his back toward Abernathy. As Eric Thomas began to walk away, Heather Thomas reached for the kitchen door outside which Abernathy stood, gun poised. The butts of both firearms that Eric Thomas was holding were facing Officer Abernathy and both guns were pointed toward the floor. Heather Thomas was between one and three feet from the kitchen door when Officer Abernathy opened fire on her husband. Heather Thomas also testified that she was reaching for the kitchen doorknob, two or three feet away, when the shooting began.

She, like Officer Abernathy, says that Eric Thomas was walking away with his back toward both her and Officer Abernathy when Eric was shot. As we know, Officer Abernathy shot Eric Thomas without warning and without ever stopping to re-evaluate because he thought that Mrs. Thomas was in "imminent danger." In other words, *Eric Thomas would have had to turn a full 180 degrees, and raise his arm, in order to shoot his wife.* This rather rudimentary reasoning, based upon undisputed facts which are learned from the only two eyewitnesses, apparently did not occur to either Captain Crumley or any other superior officer of the Chattanooga Police Department.

Miraculously, Mr. Thomas survived this shooting. His injuries are extremely severe, and largely permanent.

B. The Chattanooga Police Department's "Investigation."

Captain Janet Crumley, head of the Police Department's Internal Affairs Division, was the person charged with the responsibility of determining whether or not Officer Abernathy's shooting of Eric Thomas was or was not justified, and recommending a finding to the Deputy Chief of Police.

Captain Crumley never interviewed any witnesses herself; instead, she chose to rely on reports compiled by her investigators. To the surprise of absolutely no one, neither Eric nor Heather Thomas was willing to talk to anyone at the Police Department about anything; so, Captain Crumley relied on radio, TV, and newspaper accounts as her only sources for the Thomas' version of the shooting. She had never seen the U.S. District Court Complaint filed on behalf of Mr. and Mrs. Thomas. She has never seen Officer

Abernathy's deposition. Although she conceded its importance, Captain Crumley made no use of the Police Department's written excessive force regulations and the Use of Force Continuum contained in those regulations in reaching her conclusion, and neither she nor any other superior officer ever required Officer Abernathy to justify his failure to evaluate and re-evaluate as require by the written deadly force policies. Even though she ostensibly made no use of it, Captain Crumley conceded that the written regulations required police officers to use "the minimum force necessary to neutralize [the] threat," and that it does make a difference if an officer keeps shooting after the perceived threat is over.

Very often, what a deponent does not say is as revealing, if not more so, than that which the deponent does say. Such is the case here. Even though section 3. of the written policy expressly required it, neither Captain Crumley nor any other supervisory officer required Officer Abernathy to justify his actions.

Making sense of Captain Crumley's testimony as to why her report justifying the shooting of Eric Thomas concluded that a verbal warning was in fact given (and we know from the Abernathy deposition that no such thing occurred) requires some heavy intellectual lifting. Her deposition testimony makes it clear, first, that she completely misconstrued at least one subordinate's report; and second, that the "verbal warning" reported to her was not given by Officer Abernathy before opening fire but rather by another policeman *after* the shooting had occurred (as determined by one of Crumley's investigators, after interviewing Officer Abernathy, who never claimed to have given a warning). Astonishingly enough, Captain Crumley never sought to straighten out this obvious and very important discrepancy before writing the report justifying the shooting. And, although the investigation

upon which Captain Crumley's report was based was the only investigation ever undertaken by the Police Department, unaccountably Captain Crumley testified that it "...is never intended to be a complete investigation."

On the linchpin issue in this case – the existence of an unwritten policy, practice, or custom condoning the use of excessive, unconstitutional force by police officers, Captain Crumley's sworn testimony was stark and unapologetic. Captain Crumley testified that if she were given ten cases identical to this case, she would have handled each of them as exactly as she handled the investigation and of the Eric Thomas shooting, and her conclusion would have been the same: a justified shooting. She obviously meant this rather breathtaking statement exactly as spoken, for she also swore to the following:

> "Well, it is. It's the same manner. My report was done in the same manner that I would have done any report in Internal Affairs.
> Q: And I can say that it was done in your ordinary fashion and custom of making these reports?
> A: Yes. That is correct.

C. The Plaintiffs' Expert.

The plaintiffs secured the services of Phillip L. Davidson to serve as an expert witness on the issues of not only Officer Abernathy's conduct but also of both the written and unwritten policies, practices, and customs of the Chattanooga Police Department. The fact of Mr. Davidson's expertise in these areas is undeniable, and the City made no serious effort to dispute or question it. Mr. Davidson is an attorney, and a former uniformed police officer. He has taught police procedure in both practical and academic environments, and

holds numerous prestigious appointments. He has wide experience in testifying in police-involved lawsuits, having testified extensively for plaintiffs and defendants alike. After reviewing the materials available to him (as identified in his Affidavits), Mr. Davidson reached several opinions. First, he concluded that Officer Abernathy's conduct at the time in question was not only in violation of the Police Department's written policies but also was clearly an excessive use of force by any standards. Second, he concluded that its written policies and procedures to the contrary notwithstanding, the Chattanooga Police Department's highest-ranking supervisory personnel had for many years informally condoned the use of excessive, unconstitutional force by police officers. He based these opinions not only on his experience and training but also on the number of both lawsuits and citizen complaints alleging the use of excessive force that had been unearthed. Mr. Davidson further concluded that Officer Abernathy's acts and omissions were so egregious that Captain Crumley simply could not have recommended his exoneration unless excessive force was expressly condoned.

The defendant did not submit any expert proof at all.

D. The District Judge's Ruling.

Judge Edgar dismissively referred to Mr. Davidson as an "'expert,'" inserting his own quotation marks. He held that Mr. Davidson's opinions were "wholly conclusory," and, without explaining how it was than an expert opinion should be, or could be, other than "conclusory', ignored them. Judge Edgar held that there existed no genuine issues of material fact and consequently granted the City's Motion for Summary Judgment.

E. The Sixth Circuit's Opinion.

It is not in the least facetious to characterize the Sixth Circuit's opinion affirming Judge Edgar as holding that the plaintiffs won all the battles but lost the war. Judge R. Guy Cole, Jr., speaking for the panel, held that even in view of the truly extraordinary qualifications of the plaintiffs' expert, and even in view of the admissions described hereinabove by Captain Crumley, *Daubert* nevertheless mandated both exclusion of the expert's opinion testimony and dismissal of the lawsuit on Summary Judgment. This application for Supreme Court review followed.

ARGUMENT

Daubert serves as an object lesson on the law of unintended consequences. This court's clearly stated purpose in *Daubert* was to keep what has come to be known as "junk science" out of the courtroom, and have District Judges act as gatekeepers in the enforcement of the Federal Rules of Evidence, most particularly Rule 702. In the case at bar, we are confronted with a plaintiff's expert – Phillip Davidson - whose qualifications simply could not be higher; indeed, those qualifications were never questioned. We are confronted with data relied on by that expert that is likewise unquestioned; the data was gleaned from not only the defendant's Responses to discovery but also the public records of the state and federal courts in Chattanooga. Based on his training and experience, Mr. Davidson concluded that there did exist an unwritten but well-understood policy, practice, or custom within the Chattanooga Police Department of permitting the use of deadly force in an unconstitutional manner and a manner squarely at odds with the Police Department's own written Use of Force Continuum. We are likewise confronted by a circumstance wherein a police officer emptied his handgun

into a man in the kitchen of his own home without any warning at all, and an Internal Affairs Captain who testified that her finding of a "good shooting" would be the same ten times out of ten. The error made by the District Judge in excluding Mr. Davidson's testimony, and the error committed by the Sixth Circuit in affirming, was to apply *Daubert* criteria in a way suitable, perhaps, to a "hard science" expert but entirely unsuitable to this expert.

Rule 10[a] of the Rules of the United States Supreme Court speaks to granting the Writ of Certiorari where "a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter...". That is precisely the circumstance presented here. Petitioners earnestly insist that the Sixth Circuit's decision not only departs from the decisions of other federal appellate tribunals but also from its own prior rulings. This deviation is readily demonstrated.

I. THE SIXTH CIRCUIT'S PRIOR RULING.

It is not common for judges and lawyers to have a case "squarely on all fours" from which to seek guidance. Here, we are fortunate. *First Tenn. Bank Nat. Ass'n. v. Barrato,* 268 F.3d 319 (6th Cir. 2001) provides a splendid template upon which *Thomas v. City of Chattanooga* may be laid. There, as here, the expert's testimony fell within the "technical or specialized knowledge" language of Rule 702, rather than the "scientific" language (the expertise in *Barrato* involved letters of credit). There, as here, the area of expertise did not lend itself to peer review, or empirical verification. There, as here, the expert's most impressive qualification was, necessarily, personal experience. There, as here, the most important inquiry was not so much written policy as how an entity (there, a financial institution; here a

police department) implements policy in a day-to-day, real-world setting. There, as here, a *Daubert* objection was interposed to the expert's testimony. At trial, the District Judge found that the expert had "sufficient specialized knowledge to be helpful in understanding [this] process...", and characterized the objecting party's *Daubert* objection as taking "...an unduly narrow approach to defining the central issue at trial. " *Barrato* at 268 F.3d 333. The District Judge admitted the contested testimony, and on appeal the Sixth Circuit affirmed, holding that "The fundamental objective when considering the admissibility of 'expert' testimony is 'to ensure the reliability and relevancy' of that testimony." The Sixth Circuit agreed with the District Court that traditional *Daubert* reliability factors – peer review, empirical verification, and the like – were "unhelpful" in context. Mr. Davidson's qualifications far exceed those of the expert in *Barrato,* and his foundations are at least as sound. *Barrato* was decided correctly, and the Sixth's Circuit's ruling in the case *sub judice* simply cannot be reconciled with its ruling in *Barrato.*

II. THE FOURTH CIRCUIT.

In *Binakonsky v. Ford Motor Co.,* 133 F.3d 281, 290 (4th Cir. 1998), the Fourth Circuit held that with regard to the testimony of a medical examiner, *Daubert* criteria dealt with an expert's methodology, no more and no less. That, of course, is precisely correct. Here, Mr. Davidson's methodology was not so much as addressed.

III.THE NINTH CIRCUIT.

In *White v. Ford Motor Co.,* 312 F.3d 998, 1007ff. (9th Cir. 2002), the Ninth Circuit held that *Daubert* criteria and Rule 702 requirements differ in "hard science" and other

technical matters. As articulated herein, Mr. Davidson's experience is unparalleled and the Sixth Circuit failed to make this crucial distinction.

IV. THE EIGHTH CIRCUIT.

U.S. v. Rouse, 100 F.3d 560, 567-568 (8th Cir. 1996) presents perhaps the most striking example of a split among the circuits. In *Rouse,* the Eighth Circuit was faced with a non-"hard science" expert, just as the Sixth Circuit was here. There, the expert was a psychologist whose testimony went to the suggestibility of small children. The District Judge refused the testimony on *Daubert* grounds, and the Eighth Circuit reversed, holding that since the expert's testimony clearly would "assist the trier of fact," and since *Daubert* makes a clear distinction between "hard science" and other technical expertise, the testimony was not only relevant within the meaning of Article IV of the Federal Rules of Evidence but also fully in keeping with both the spirit and the letter of Rule 702. THIS IS THE DISTINCTION WHICH THE SIXTH CIRCUIT FAILED TO MAKE.

CONCLUSION

There can be no serious dispute that, at minimum, a different result would have been obtained in this case in the Fourth, Ninth, and most especially the Eighth circuits. Moreover, this Sixth Circuit panel in effect overruled its own rule, without so much as addressing *Barrato*. The instant case provides the United States Supreme Court a superb opportunity to address the proper application of *Daubert* in § 1983 litigation. For these reasons, concepts of fundamental fairness require that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-6308

[Filed February 9, 2005]

JOHN ERIC THOMAS,	)
and wife, HEATHER THOMAS,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
CITY OF CHATTANOOGA,	)
TENNESSEE,	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga
No. 02-00228
R. Allan Edgar, Chief District Judge

Before: COLE and ROGERS, Circuit Judges; COHN, District Judge.*

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* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

R. GUY COLE, JR., Circuit Judge. Plaintiffs-Appellants, Eric and Heather Thomas, bring this appeal following the district court's grant of summary judgment in favor of the City of Chattanooga's Police Department in a municipal liability action under 42 U.S.C. § 1983. The appellants claim that the Chattanooga Police Department had a policy, custom, or practice of condoning the use of excessive force against suspects. For the reasons discussed below, we **AFFIRM** the decision of the district court.

I.

A. The Shooting

On May 28, 2002, at approximately 6:45 p.m., one of Eric Thomas's neighbors called the police to report a disorder at Thomas's home, because Thomas and his father had been loudly arguing. When the police arrived however, the dispute had been resolved. Later that night, at around 11:30 p.m., Thomas was driving home from a friend's house when the muffler and exhaust pipe fell off his truck. Thomas became upset and continued to drive home, dragging the muffler and exhaust pipe on the street and squealing his tires as he entered his driveway. Thomas entered his house, and he noticed that some of the firearms from his gun collection had been moved from where he left them earlier that day. He went out his side kitchen door, yelling to his wife, Heather, who was next door at her parent's house, "where's all the guns?" She yelled back that his mother had moved them. Heather then returned home, found the guns, and placed them on the kitchen table.

Meanwhile, a neighbor called the police to report a domestic disorder and told the dispatcher that a man and

woman were screaming at each other. Officer Abernathy (who knew nothing of the earlier domestic disorder call) was first to respond, and was told by the dispatcher that there was "a guy riding up and down the street in a truck hollering and screaming, burning rubber in the street," and that the man had a baseball bat. Upon arriving at the neighborhood, Officer Abernathy was told by an elderly man in the street that Thomas's house was the scene of the domestic disorder. The officer walked toward Thomas's house and heard two people screaming at each other from inside the house. He radioed for backup and then continued to walk toward the porch. Dogs were barking in the backyard as he entered the porch and he could see into the kitchen through a window in the top half portion of the door.

Officer Abernathy saw a man and woman (Thomas and his wife) facing each other, but he could not hear what they were saying. According to the officer, the man was facing a hallway and the woman was next to the kitchen cabinets. He observed two rifles on the kitchen countertop and saw that the man had a handgun in each hand. The officer saw the man "take a staggered step with his left foot" towards the hallway, and the woman reach for the kitchen door, presumably to unlock it. Officer Abernathy then saw the man begin to turn towards the woman. At this point the officer's vision was partially obstructed. In his deposition, officer Abernathy stated that "[w]hen Mr. Thomas [was] turning to his right, I lost sight of the gun in his left hand which I felt traveled up to a point at her." Officer Abernathy believed that the man and woman had some sort of exchange, and then he saw "Mrs. Thomas start to back up and it looked like she had her hands down to her side." Officer Abernathy claims that the man swayed in the direction of the woman and he saw "an almost surprised expression on her face." At that point, officer Abernathy claims that "there was no doubt in [his]

mind, based on her expression and her body language, that she was in imminent danger," and that he was in secondary danger if the man saw him through the window, or knew of his presence because of the loud barking by the dogs. Based on his belief that Eric Thomas was an immediate threat, the officer fired seven continuous rounds through the glass in the kitchen door at Thomas's left arm. Thomas and his wife both claim that they were merely putting away the guns and that Thomas had started to walk away from his wife when he was shot.

Officer Abernathy does not believe that he announced himself as a police officer before the shooting because he did not think there was enough time. It is unclear whether either Thomas or his wife saw the officer on their porch. Officer Abernathy also stated that he did not stop to reevaluate the scene after firing one or two shots because he did not see Thomas drop the guns and thus he believed that the threat had not been subdued. Thomas was hit with seven bullets in his back and in his left arm. Thomas survived the injuries, but is now partially disabled.

B. The Internal Investigation

The Internal Affairs Division of the Chattanooga Police Department, headed by Captain Janet Crumley, conducted an investigation of the shooting. Based upon her review of Sergeant Russell's investigative report, Crumley determined that the shooting was justified. At the time of the report, Thomas and his wife were unwilling to give Crumley their statements. Crumley noted the relevant facts in the report, but included that officer Abernathy *had* issued a verbal warning through the closed door. Crumley concluded that "Officer Abernathy fired his weapon to protect Heather Thomas from what he reasonably believed to be an imminent threat of

serious bodily harm or death," and that "[h]is actions were in compliance with Department Policy." Crumley's determination was reviewed and approved by the Chief of Police. Upon later questioning, Crumley was told that officer Abernathy might not have announced himself or issued a warning prior to shooting Thomas. Crumley maintained that the shooting was justified because the facts still indicated that officer Abernathy perceived Thomas as an immediate threat to his wife. In her deposition, Crumley was asked how she would decide, hypothetically, ten separate cases that were each identical to Thomas's situation, and Crumley responded that she would decide each case the same way she decided this case.

Eric and Heather Thomas did not sue officer Abernathy in any capacity; rather, they chose to sue the Chattanooga Police Department under a municipal liability theory. The City of Chattanooga moved for summary judgment against the Thomases. In response, the Thomases relied on affidavits from their expert witness, Phillip Davidson, who had experience with police operations. The City supported its motion with three affidavits from police officials familiar with the Department's policies and practices. All of these officials denied the existence of any policy in the Department condoning the use of unlawful excessive force. The district court determined that the plaintiffs had not presented a genuine issue of any material fact and granted the City's motion for summary judgment.

II.

A. Municipal Liability Under § 1983

We apply a *de novo* standard in reviewing the district court's grant of summary judgment. *McLean v. 988011*

Ontario, Ltd., 224 F.3d 797, 800 (6th Cir. 2000). Summary judgment is proper where the movant shows through "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The nonmovant must rebut such a showing by presenting sufficient evidence on which the jury could reasonably find for him; "[a] mere scintilla of evidence is insufficient" to meet this burden. *McLean*, 224 F.3d at 800. "In deciding a motion for summary judgment, this court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party." *Id.*

Section 1983 creates a federal cause of action against state or local officials who deprive a person of a federal right while acting under the color of state law. 42 U.S.C. § 1983. To prevail in a § 1983 suit against a municipality, a plaintiff must show that the alleged federal right violation occurred because of a municipal policy or custom. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). A municipality "may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Id.*

There are at least four avenues a plaintiff may take to prove the existence of a municipality's illegal policy or custom. The plaintiff can look to (1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations. *Id.*; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986); *Stemler v. City of Florence*,

126 F.3d 856, 865 (6th Cir. 1997); *Doe v. Claiborne County*, 103 F.3d 495, 507 (6th Cir. 1996).

In the present case, the Thomases alleged that the City of Chattanooga had an unwritten policy, practice, or custom of condoning the use of excessive force against potential suspects. In *Doe*, this Court articulated the requirements for a municipal liability claim made on the basis of an "inaction theory," where a policy of tolerating federal rights violations is unwritten but nevertheless entrenched. We stated that, under such a theory, the plaintiff must show:

> (1) the existence of a clear and persistent pattern of [illegal activity];
> (2) notice or constructive notice on the part of the [defendant];
> (3) the [defendant's] tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
> (4) that the [defendant's] custom was the "moving force" or direct causal link in the constitutional deprivation.

Doe, 103 F.3d at 508.

The City of Chattanooga moved to dismiss the Thomases' claim on the theory that the Thomases had failed to present a genuine issue of material fact indicating that the Police Department had a policy or custom of condoning the excessive use of force. The City relied primarily on three affidavits from Sergeant Charles Russell, Captain Mike Williams, and Lon Eilders. Sergeant Russell, of the Internal Affairs Division, stated that there have never been any complaints of excessive force against officer Abernathy, that

the Department did "not have any policy, custom or practice allowing police officers to use excessive force on any suspect," and that "no policy-making official of the City has ever authorized or condoned any policy or custom of using excessive force." Captain Williams, who is in charge of the Chattanooga Police Department Training Division, stated that officer Abernathy received proper training regarding use of deadly force; that to his knowledge, the City "did not have a policy, custom or practice of training its police officers to use deadly force on any suspect unless the officer clearly believed deadly force was immediately necessary"; and that the City has never authorized or condoned excessive force, nor did it fail to train its officers due to any "deliberate indifference." Finally, Mr. Eilders, who manages the Accreditation and Standards for the Police Department, stated that he is "familiar with the customs and practices within the Police Department as they existed in May of 2002," and that it did not have a policy, custom or practice of allowing its officers to use unwarranted excessive force.

In rebuttal, the Thomases presented affidavits from their witness, Phillip Davidson, regarding the Police Department's practice of condoning the use of excessive force by its officers. Davidson's first affidavit was two pages and the relevant portion in its entirety stated:

> Based on my experience with other cities in cases similar to this one, the number of formal civil cases alleging use of excessive force by police officers filed against the City of Chattanooga indicates that . . . Chattanooga Police Department uniformed officers acted within an informal, unwritten policy, practice, or custom wherein the unlawful use of force-the use of excessive force-was tolerated. In my experience, this "culture" must necessarily have been known to

> Chattanooga Police Department . . . illustrated by the fact that [Crumley] recommended that Officer Abernathy's shooting of Mr. Thomas be "...carried as justified."

A few days later, Davidson submitted a second affidavit, which essentially reiterated his first affidavit and added that he had reviewed statistical evidence, consisting of some of the complaints and civil cover sheets from the forty-five suits filed against the Chattanooga Police Department alleging use of excessive force since July of 1994. Davidson had not examined the details of any of these suits beyond merely looking at the complaints. Finally, in a supplemental affidavit, Davidson stated that he inferred a policy, practice, or custom of condoning excessive force in the Police Department based on the fact that officer Abernathy was found justified in shooting Thomas, and that Crumley stated in her deposition that she prepared her investigative report in the "customary way," and would have decided the case the same way if she had to do it over again. Davidson essentially argued that there must have been a policy or custom of condoning excessive force in the Chattanooga Police Department because there had been several complaints of excessive force against the Department in the past, and because here, in Davidson's opinion, officer Abernathy had violated the Department's written "use of force" policy and yet his actions were deemed justified by the Department.

1. The Previous Complaints Against the Department as Evidence of a "Policy"

The district court determined that Davidson's inference that the Police Department had an unwritten policy condoning excessive force was conclusory, because Davidson never "set forth the basis or reasoning behind his opinion." The civil

complaints which Davidson evaluated ranged from a shooting to a broken fingernail, but Davidson did nothing to inform the court as to whether most of the complaints were serious or frivolous. Davidson also failed to explain how one could evaluate the mere number of complaints in a vacuum to come to a conclusion about the Department's policies. Moreover, Davidson failed to present any "data upon which the Court could compare or contrast the number of excessive force complaints made by citizens of Chattanooga with the number of excessive force complaints in similarly-sized cities or in cities with a similarly sized police force." We agree with the district court's finding that Davidson's opinion was conclusory because he did not explain how he drew his conclusions from the list of complaints made against the Department.

First, appellants argue that the lower court improperly dismissed Davidson's testimony because the court disagreed with Davidson's conclusion that the number of complaints against the city in and of themselves demonstrated an unwritten policy of condoning excessive force. Appellants point to a portion of the district court's opinion which states that "if the Chattanooga Police Department finds a complaint of excessive force to be justified or well-founded approximately every 10 months, it obviously does not have a policy of denying all excessive force claims or sweeping them under the carpet." Although this type of assumption by a district court would not be appropriate, given the context of the opinion, it is clear that the court was not disagreeing with Davidson's expert opinion; rather, the court was pointing out that the statistics upon which that opinion was based are meaningless because Davidson did not produce any data showing what a "normal" number of excessive force complaints would be. Consequently, we find that the court did

not disagree with Davidson's conclusion; it simply could not accept the basis behind it.

Next, appellants argue that the court made a negative credibility determination regarding Davidson-an issue that should have survived summary judgment and gone to a jury. This argument misunderstands the district court's opinion. The court did not make a credibility determination because the issue was not Davidson's credibility; the issue was whether Davidson could substantiate his opinion where necessary.

This argument brings us to the crux of appellants' case. Appellants argue that, based on Davidson's vast expertise and experience alone, the district court should have denied summary judgment because Davidson surmised that there must have been an unwritten policy of condoning excessive force. Additionally, appellants argue that because this case does not involve a "hard science," the traditional *Daubert* factors,[1] which the courts use to evaluate the reliability of an expert's testimony, are not readily applicable.

To some degree, appellants are correct. The Supreme Court has held that the principles articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct.

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[1] The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 590-97, 125 L. Ed. 2d 469 (1993) listed several factors which the lower courts should consider in determining the reliability of scientific evidence, including: whether the theory can be reliably tested; whether it has been subject to peer review; what the theory or test's potential rate of error of is; whether there are standards controlling the test's operations; whether the theory or test is generally accepted; and whether the expert conducted the work independent of litigation.

2786, 125 L. Ed. 2d 469 (1993), apply to "all expert testimony," although the lower courts have flexibility in the application of the factors, because it may not make sense to apply some of the *Daubert* factors, such as the rate of error analysis, to non-scientific testimony. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). In this case, appellants believe that because we are dealing with non-scientific testimony, Davidson may rely solely on his experience to explain the conclusion he drew from the number of complaints filed against the Police Department, rather than having to explain to the court why and how he came to those conclusions. An expert may certainly rely on his experience in making conclusions, particularly in this context where an expert is asked to opine about police behavior. *See* FED. R. EVID. 702 advisory committee's note (2000) ("In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.") We need not doubt whether Davidson is qualified to assess police operations. Indeed, Davidson's curriculum vitae suggests that his long career in the fields of criminal justice, the law, and education have all related to police training and operations.

However, being an expert does not lessen the burden one has in rebutting a motion for summary judgment. In fact "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached . . . and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *See* FED. R. EVID. 702 advisory committee's note. When *Daubert* was remanded back to the Ninth Circuit, the court stated that "[w]e've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough." *Daubert*, 43

F.3d 1311, 1319 (9th Cir. 1995). Similarly, in this case, because Davidson's affidavits provide no rationale for his conclusions, appellants are asking that we take their expert's "word for it." We cannot. Davidson himself stated that "there's no brightline or rule" regarding how many complaints would be excessive, suggesting that an expert would need to conduct a more qualitative analysis. However, Davidson did not conduct such an analysis, and instead, in his deposition he merely mentioned a few cases where the courts have let the jury determine whether the municipality had an unwritten illegal policy. Even then, Davidson offered no qualitative analysis of those cases and how they were similar to the present case. Therefore, Davidson's conclusion, that the Police Department must have an unwritten policy of condoning excessive force because of the mere number of complaints previously filed against it, is insufficient to create a genuine issue of material fact on which a jury could reasonably find that such a policy exists.

2. *The Shooting and the Resulting Investigation as Evidence of a "Policy"*

Appellants also argue that Davidson partially based his conclusion on the fact that Thomas was shot in violation of Department policy, and the internal investigation nonetheless determined the shooting to be justified. There is potentially a real question as to whether officer Abernathy was justified in shooting Thomas. But this question is not before us. The question here is whether there was some sort of policy, custom, or practice in the Chattanooga Police Department of condoning excessive force, and under *Doe*, such a policy must be shown by a clear and persistent pattern. 103 F.3d at 508. The danger in appellants' argument is that they are attempting to infer a municipal-wide policy based solely on one instance of potential misconduct. This argument, taken to

its logical end, would result in the collapsing of the municipal liability standard into a simple *respondeat superior* standard. This path to municipal liability has been forbidden by the Supreme Court. *Monell,* 436 U.S. at 694; *cf. Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 410, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) (holding that a municipality was not liable for its hiring decision where the employee later went on to use excessive force against plaintiff because the plaintiff failed to demonstrate that the municipality directly caused the injury through its own deliberate action). Thus, without showing more than officer Abernathy's potentially excessive use of force in this particular case, Thomas cannot survive summary judgment.

Appellants' best argument is that the Department has a custom of mishandling investigations of excessive force complaints. Davidson contends that the shooting of Thomas and the Department's treatment of Thomas's case is itself proof that it had an unwritten policy of failing to discipline its officers when they use excessive force against suspects. Davidson stated that "in my opinion, Captain Crumley's report provides a clear insight into the Chattanooga Police Department's 'customary' method of preparing excessive force reports," and that, in his opinion, officer Abernathy violated the Department's written "use of force" policy.

It is debatable whether the Police Department properly deemed this shooting "justified." However as the district court noted, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments . . ." (quoting *Graham v. Connor*, 490

U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

All this aside, appellants must show not only that the investigation was inadequate, but that the flaws in this particular investigation were representative of (1) a clear and persistent pattern of illegal activity, (2) which the Department knew or should have known about, (3) yet remained deliberately indifferent about, and (4) that the Department's custom was the cause of the shooting here. *See Doe*, 103 F.3d at 508. Davidson's analysis focused mainly on the "deliberate indifference" aspects of this case.

As this Court noted in *Doe*, deliberate indifference "does not mean a collection of sloppy, or even reckless oversights; it means evidence showing an obvious, deliberate indifference" to the alleged violation. *Id.*; *Bd. of County Comm'rs of Bryan County*, 520 U.S. at 407 (holding that deliberate indifference cannot be met by a "showing of simple or even heightened negligence").The *Doe* Court found that even where a school board had some information that one of its teachers may have sexually abused students in the past and the board failed to remove him before he abused the plaintiff, the school board could not be found liable for having a policy, custom, or practice of condoning such abuse because there was no evidence that the school board failed to act regarding other teachers in similar circumstances; thus there was no evidence of any deliberate pattern. *Id.* at 508. *Doe* makes clear that the plaintiff bears a heavy burden in proving municipal liability, and he cannot rely solely on a single instance to infer a policy of deliberate indifference.

Despite the extreme circumstances here, appellants have not met their burden of showing that there is a genuine issue of whether an illegal Police Department policy exists.

Appellants' expert inferred an illegal municipal policy from the Department's potentially insufficient investigation of Thomas's case, just as the plaintiff in *Doe* attempted to infer an illegal municipal policy from the school board's failure to remove the dangerous teacher at issue. Appellants' expert did not reach beyond the facts of this case to show any possibility of a pattern. Appellants point to this Court's finding in *Leach v. Sheriff of Shelby County*, 891 F.2d 1241 (6th Cir. 1989), in support of the notion that deliberate indifference can be demonstrated by a municipality's failure to adequately investigate claims. However, in *Leach*, this Court was convinced that the municipality had a policy of deliberate indifference to prisoners' medical needs based on the fact that there were several separate instances where the prison failed to investigate prisoner mistreatment. 891 F.2d at 1246-48 (noting that the lower court found that "at least 14 other paraplegics had received similar deplorable treatment"). Unlike the plaintiffs in *Leach*, appellants have failed to show several separate instances of the alleged rights violation. Furthermore, the fact that Crumley stated that she would find officer Abernathy "justified" in his shooting if she had to make the same decision again, does not show a pattern of deliberate indifference that goes beyond the facts of appellants' own case. Rather, Crumley's statement was about a hypothetical situation that was based entirely on the facts of Thomas's own case. Therefore, appellants' argument falls prey to the problem of collapsing the municipal liability standard into a *respondeat superior* standard.

Because Davidson failed to provide any explanation for his reliance on the mere number of excessive force complaints against the Police Department, the basis of his opinion has been reduced to the facts of Thomas's case. These facts fall short of proving deliberate indifference by the municipality.

III.

For the reasons stated above, we hereby **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

No. 1:02-cv-228

[Filed September 16, 2003]

JOHN ERIC THOMAS; ET UX, HEATHER THOMAS, Plaintiffs,

v.

THE CITY OF CHATTANOOGA, TENNESSEE, Defendant.

R. ALLAN EDGAR
CHIEF UNITED STATES DISTRICT JUDGE

MEMORANDUM

I. Introduction

Plaintiff Eric Thomas seeks damages from the defendants, the City of Chattanooga, Tennessee, ("City") for deprivation of his civil rights under color of state law pursuant to 42 U.S.C. § 1983. Specifically, in their First Amended

Complaint, filed on July 10, 2003 [Court File No. 23], the plaintiffs allege that the shooting of plaintiff John Eric Thomas ("Eric Thomas") by Reginald Abernathy, a City police officer on the night of May 27, 2002, constituted the "use of excessive and unreasonable force while acting under color of law." *Id.* The plaintiffs aver that the shooting of plaintiff Eric Thomas by Officer Abernathy deprived Eric Thomas of the rights guaranteed him by the Fourth and Fourteenth Amendments to the United States Constitution, namely:

> (1) freedom from the use of excessive and unreasonable force;
> (2) freedom from the deprivation of liberty without due process; and,
> (3) freedom from summary punishment.

[Court File No. 23]. Plaintiffs further alleged that on May 27, 2002, Officer Abernathy "failed to identify himself as a police officer prior to opening fire, failed to warn, failed to exhaust all other reasonable means of apprehension, and had no probable cause to believe that Eric Thomas posed a threat of serious bodily injury or had committed a felony involving the infliction or threatened infliction of serious bodily injury, . . . in that Eric Thomas was not fleeing at the time in question." [Court File No. 23, p. 7] Plaintiffs alleged that defendant is liable to them by "virtue of having, within its Police Department, a practice, policy, custom or usage of unlawful excessive force by Police Officers." *Id.*

Plaintiffs seek $25,000,000.00 in compensatory and punitive damages. [Court File No. 23, p. 8]. They further seek attorney's fees, litigation expenses, and costs from defendant pursuant to 42 U.S.C. § 1988. *Id.*

II. Background

The Facts alleged in plaintiffs' First Amended Complaint are:

> On May 27, 2002, the plaintiffs were having a Memorial Day cook-out for immediate family members at their home, located at 4806 Hal Drive, Chattanooga, Tennessee. At approximately 6:45-7:00 PM, Eric Thomas and his father, Larry Thomas, were inside the screened-in porch of Eric's home and they became involved in an argument. The neighbors across the street, who had moved in only three days before, called in Chattanooga Police Department to report a "disorder" at the Thomas home, after hearing Eric and his father argue. Police Officer Rob Stainline was dispatched to 4806 Hal Drive where ". . . upon arrival [he] was met by John (Eric) Thomas and his father Larry Thomas. The two advised that they had been involved in a verbal argument but had resolved their problem." Shortly thereafter, the police departed the Thomas residence.
>
> Later that same evening, Eric Thomas left his home to deliver some leftover barbecue to friends in East Ridge. He was returning home at approximately 11:30-11:45 PM when, while in close proximity to his home, the muffler and exhaust pipe on his 1979 Chevrolet truck fell off and began dragging along the pavement, creating a great deal of noise. Eric Thomas had been working on the old truck all of the previous week in preparation for a new job which was scheduled to begin the following Monday which job involved his renovation business, and the old truck was his only transportation. When the exhaust system

collapsed as described hereinabove, Eric Thomas became very frustrated, and as a result he squealed his fires as he turned into his driveway.

At approximately 11:55 PM, the Chattanooga Police Department dispatched officer Reginald Abernathy to the Thomas residence after a neighbor or neighbors complained of "squealing tires and people fighting and carrying on."

Eric Thomas left the truck and went inside his home. At this time, his wife, Heather, and their five year-old daughter, Amanda, were next door at the home of Heather's parents, Mr. and Mrs. James Rector. After entering his home Eric Thomas noticed that some of his firearms were not where he had left them earlier in the day, when he had been showing them to his father. Eric Thomas did not know that his mother had hidden the firearms earlier in the day because she knew that Amanda was coming from next door and the firearms were not in their usual safe place.

Eric Thomas then stepped out his side kitchen door and yelled next door to his wife, Where's all the guns?" Heather Thomas heard her husband call out and yelled back, "Your mom put them up. I'll be right over." Heather Thomas immediately came to her home from next door and retrieved the firearms, bringing them into the kitchen. Heather laid the rifles on the kitchen counter and handed Eric a 9mm Beretta handgun that belonged to her father, who had asked that Eric clean it for him. Eric had another pistol in his hand, a .357 Navy Arms revolver, that he had brought in from his truck. Eric was just starting to leave the kitchen to put the guns away when he and Heather heard their dogs barking outside, and heard

> the yard gate chain rattling. Heather was near the kitchen door, and about to open it to see who or what was out there at such a late hour, when . . . . gunfire erupted from outside the kitchen door . . .
>
> The shots fired described . . . struck Eric Thomas as he was departing his kitchen and in the hallway which lead away from the kitchen. The shots in question were fired by Chattanooga Police Officer Reginald Abernathy from his .45 caliber weapon . . . Officer Abernathy fired seven bullets striking Eric Thomas in the back and left arm.

[Court File No.. 23, pp. 2-4].

On May 28, 2002, City police officer Reginald Abernathy responded to a domestic disorder call from the police dispatcher at approximately 12:30 A.M. [Court File No. 24, Abernathy dep'n, p. 46]. The dispatch was for 4805 Hal Drive, which was located across the street from the Thomas house. *Id.* at 46. The dispatch stated that there was " . . . a guy riding up and down the street in a truck, hollering and screaming, burning rubber in the street. They advised me he had a baseball bat. . . That's why they sent an extra car with me . . ." *Id.*

At the time of the dispatch, Officer Abernathy was approximately one mile from the scene and he arrived there first, within a minute to a minute-and-a-half from the time of the dispatch. *Id.* 48-49. When Officer Abernathy arrived at the scene, he saw an older gentleman standing in the street. [Court File No. 24, Abernathy dep'n, p. 49]. The gentleman pointed to the Thomas house, 4806 Hal Drive, and told Officer Abernathy there was a domestic disorder at the house across the street. *Id.* at 51. Officer Abernathy exited his

vehicle and heard voices coming from the house at 4806 Hal Drive. *Id.* at 54-57.

He walked further down the street and heard screaming coming from 4806 Hal Drive. *Id.* at 57. Officer Abernathy stated he heard two people -- one male and one female -- screaming at each other, but he could not make out what they were saying. *Id.* at 58.

Officer Abernathy walked up the driveway at 4806 Hal Drive and through a gate. *Id.* at 59-60. At some point, approximately halfway up the driveway, Officer Abernathy radioed the police dispatcher to send/hurry up the other police car because he could hear screaming. *Id.* at 60-61, 63.

Officer Abernathy walked toward the porch on the right side of the house where he saw a light shining onto the porch. *Id.* at 63. As he approached the side porch, Officer Abernathy heard dogs barking in the backyard. *Id.* at 64.

Officer Abernathy was able to see the light coming out of the kitchen and could see into the kitchen through the window in the top half of the door. *Id.* at 66. Officer Abernathy saw a man and a woman in the kitchen. The woman was facing the man. *Id.* at 67. Officer Abernathy was able to observe the man and woman through the kitchen door, but he was unable to hear what they were saying. *Id.* at 68.

At the time Officer Abernathy first looked through the window, the man, now known as plaintiff Eric Thomas, was facing down the hallway. *Id.* at 73. The woman, now known as plaintiff Heather Thomas, was standing next to the kitchen cabinets, facing Eric Thomas. [Court File No. 24, Abernathy dep'n, p. 75].

At that time, Heather Thomas and Eric Thomas were between one and one-half and three feet apart. *Id.* Officer Abernathy saw two rifles laying on the kitchen countertop and Eric Thomas had a handgun in each hand. *Id.* at 77-78. Officer Abernathy then observed Eric Thomas take a staggered step with his left foot towards the hallway, while Heather Thomas turned towards her left and reached for the kitchen door. *Id.* at 78-79.

Officer Abernathy was standing under a porch light and believed he was illuminated to the two people standing in the kitchen. *Id.* at 80. He does not recall whether he ever announced himself as a police officer. *Id.* However, he does not think he did so because of the short time frame of the events in question. *Id.* at 80.

Officer Abernathy thought that Heather Thomas saw him and was reaching over to unlock the door. *Id.* at 80-82. Officer Abernathy tried to open the door but it was unlocked. *Id.* at 82. At that point, Eric Thomas began turning towards Heather Thomas and Officer Abernathy lost sight of the gun in Eric Thomas' left hand. *Id.* at 82. Officer Abernathy testified he believed the gun in Eric Thomas' left hand was a bigger threat to Heather Thomas because she was closer to him. *Id.* Officer Abernathy further testified that at the point Eric Thomas began to turn towards Heather Thomas he believed she was in imminent danger. *Id.*

As Eric Thomas turned to Heather Thomas, they had an exchange which Officer Abernathy could not hear. [Court File No. 24, Abernathy dep'n, p. 84]. However, at that point, Officer Abernathy testified:

> But Mrs. Thomas started to back up and it looked like she had her hands down to her side. She didn't have

> them -- but, you know, at some point there was no doubt in my mind, based on her expression and her body language, that she was in imminent danger.

Id.

When Eric Thomas turned towards Heather Thomas, Officer Abernathy focused on his left arm and hand. [Court File No. 24, Abernathy dep'n, p. 91]. Officer Abernathy described this as:

> When Mr. Thomas is turning to his right I lost sight of the gun in his left hand which I felt traveled up to a point at her. When he did take another step -- his body was swaying in that direction, Mrs. Thomas, when she backed up with her hands out, with an almost surprised expression on her face, it gave me enough to say, well she was going to be in danger if he completes his turn and is going to put me in secondary danger if he sees me out here on the porch.

Id. at 105. Officer Abernathy further stated:

> . . . Mr. Thomas took the step and he turned, that's when I started firing because her life I felt was in imminent danger.

Id. at 107.

Officer Abernathy aimed at Eric Thomas' left arm and fired multiple continuous rounds -- seven -- over a period of a couple of seconds. [Court File No. 24, Abernathy dep'n, pp. 91-93]. When Officer Abernathy began firing the glass in the kitchen door shattered and obstructed his view, but he intended to shoot until he no longer saw a threat from Eric

Thomas. *Id.* at 95. Officer Abernathy testified that he did not stop and reevaluate the situation after firing one or two shots, *id.* at 95, he continued shooting until he no longer perceived a threat from Eric Thomas. *Id.* 110.

Following the shooting, Officer Abernathy remained outside of the residence until his backup, Sergeant McPherson, arrived at the house. *Id.* at 97. Sergeant McPherson arrived and yelled inside the house to make contact with Eric Thomas. *Id.* at 99. Once Sergeant McPherson made verbal contact with Eric Thomas, Officer Abernathy and Sergeant McPherson forced entry through the kitchen door and found Eric Thomas lying on the floor. *Id.* at 98-101. Officer Abernathy called for an ambulance and at that point Sergeant Rogers removed him from the residence. *Id.* at 103.

Prior to the incident on the night of May 27, 2002 and during the course of his employment with the City police department, Officer Abernathy had never shot another individual. [Court File No. 24, Abernathy dep'n, p. 129]. Further, during his employment with the City police department he never had any disciplinary action taken against him and there had never been any "founded internal complaint" against him. *Id.* at 132.

Officer Abernathy has received video training from the City police department, *id.* at 29, as well as annual in-service training. *Id.* at 130. That training consisted of twice-a-year qualifying sessions on the shooting range as well as classroom instruction on various aspects of law enforcement. *Id.*

Officer Abernathy also testified he received training from the City police department concerning the need to announce himself as a police officer and give an individual time to

comply. *Id.* at 137. He stated that the training he received on that subject was appropriate. *Id.* However, he stated that under the circumstances, he did not believe there was enough time to announce himself as a police officer. *Id.* at 138. Further, Officer Abernathy testified his training as a police officer also taught him to be concerned about the location of a firearm when he knew an individual possessed one, *id.* at 140, and he became concerned when Eric Thomas turned to Heather Thomas and he lost sight of the gun in his left hand. *Id.* at 140.

III. Defendants' Motion for a Judgment on the Pleadings or, in the alternative, a Summary Judgment [Court File No. 24].

Defendant has moved for a judgment on the pleadings, or in the alternative, a summary judgment [Court File No. 24]. However, pursuant to FED. R. CIV. P. 12(c), because matters outside of the pleadings -- i.e., depositions and other exhibits -- have been presented and not excluded by this court, defendant's motion must be treated as a summary judgment and disposed of pursuant to FED. R. CIV. P. 56. *Pierzynowski v. Police Dep't*, 941 F. Supp. 633, 639 (E.D. Mich. 1996)(citing *Scott v. Central States, Southeast & Southwest Areas Pension Plan*, 727 F. Supp. 1095, 1095 (E.D. Mich. 1989). Thus, the Court will treat defendant's motion for a judgment on the pleadings as a motion for summary judgment.

A. Standard of Review

Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In ruling on a motion for summary judgment, the Court must view the

facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *National Satellite Sports, Inc. v. Eliadis Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). The Court cannot weigh the evidence or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). To refute such a showing, the non-moving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material, factual dispute. *Celotex Corp.*, 477 U.S. at 322. A mere scintilla of evidence is not enough. *Anderson*, 477 U.S. at 252; *McLean v. Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). The Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the non-moving party. *Anderson*, 477 U.S. at 248, 249; *National Satellite Sports*, 253 F.3d at 907.

B. Analysis

Defendant the City of Chattanooga, Tennessee, ("City") seeks a summary judgment on plaintiffs' claims against it under 42 U.S.C. § 1983. In seeking a summary judgment, the City contends that no specific policies, customs or practices of the City have been established as the result of the discovery in this action which resulted in any unconstitutional injury or damages to the plaintiffs. [Court File No. 25]. Further, the City contends that in their First Amended Complaint [Court File No. 23], the plaintiffs have neither alleged "deliberate

indifference" on the part of the City, nor did they allege any specific actions on the party of the City which could have constituted "deliberate indifference." [Court File No. 25]. Accordingly, the City contends that it is entitled to a summary judgment on the claims made by the plaintiffs against it. *Id.*

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

In order to prevail on a claim for a violation of civil rights under 42 U.S.C. § 1983 a plaintiff must establish: (1) he was deprived of a right secured by the Federal Constitution or laws of the United States and (2) that the aforesaid deprivation was caused by a person acting under color of state law. *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 155-57, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

More specifically, to impose liability on a governmental entity, such as The City of Chattanooga, Tennessee, under 42 U.S.C. § 1983, a plaintiff must show that there was some official governmental policy or custom in place that violated his constitutional rights; a governmental entity cannot be held liable under § 1983 for the acts of its employees under a theory of *respondeat superior. Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). In this action, plaintiffs have alleged that the City

police department had a practice, policy, custom or usage of unlawful excessive force by its officers. [Court File No. 23, p. 7].

"To obtain a judgment against a municipality, a plaintiff must prove that the municipality itself supported the violation of rights alleged." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990)(citing *Monell*, 436 U.S. at 692-95). "Section 1983 liability attached to a municipality only when 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.'" *Id.* (quoting *Monell* at 694).

It is burden of the plaintiffs to show that a policymaker is responsible either for the policy or, through acquiescence, for the custom. *Id.* (citing *Jett v. Dallas Independent School District*, 491 U.S. 701, 737, 109 S. Ct. 2702, 2723, 105 L. Ed. 2d 598 (1989).

There are two ways to establish a policy or custom. A policy exists when a "decisionmaker possessing final authority to establish municipal policy with respect to the action" issues either an official policy, proclamation, or edict. *Andrews*, 895 F.2d at 1480 (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S. Ct. 1292, 1299, 89 L. Ed. 2d 452 (1986)). A course of conduct will be considered to be a "custom" when, even though not authorized by law, "such practices of state officials [are] so permanent and well settled" as to virtually constitute law. *Id.* (citing *Monell*, 436 U.S. at 690, 98 S. Ct. at 2035 (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68, 90 S. Ct. 1598, 1613-14, 26 L. Ed. 2d 142 (1970)).

In *Doe v. Claiborne County, Tenn, By and Through Claiborne County Bd. of Educ.*, 103 F.3d 495 (6th Cir. 1996), the Sixth Circuit explained:

> A "custom" for purposes of *Monell* liability must be "so permanent and well settled as to constitute a custom or usage with the force of law." *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036 (internal quotation marks and citation omitted); *see also Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir.), *cert. denied*, 510 U.S. 826, 114 S. Ct. 90, 126 L. Ed. 2d 57 (1993). In turn, the notion of "law" must include "deeply embedded traditional ways of carrying out state policy." *Nashville, Chattanooga & St. Louis Ry. Co. v. Browning*, 310 U.S. 362, 369, 60 S. Ct. 968, 84 L. Ed. 1254 (1940). It must reflect a course of action deliberately chose from among various alternatives. *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791 (1985). In short, a "custom" is a "legal institution" not memorialized by written law. *Feliciano*, 988 F.2d at 655.

Doe, 103 F.3d at 507-08.

In *Warren v. Shelby County, Tenn.*, 191 F. Supp. 2d 980 (W.D. Tenn. 2001), the court further explained:

> "Official policy often refers to formal rules or understandings -- often but not always committed to writing -- that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur*, 475 U.S. at 480-81, 106 S. Ct. at 1299. A plaintiff must, in order to show a custom or policy, adduce

> specific facts in support of his claim. Conclusory allegations will not lie. *Culberson v. Doan*, 125 F. Supp. 2d 252, 263-64 (S.D. Ohio. 2000).

Id. at 984-985.

As part of their response to defendant's motion for a summary judgment [Court File No. 29], the plaintiffs have filed the affidavit of Phillip L. Davidson, their FED. R. CIV. P. 26(a)(2) expert. That statement reads in pertinent part:

> Officer Abernathy's actions at the time and place in question do not comply with the City of Chattanooga's written procedure. It is my experience that insofar as use of force is concerned, written regulations are often honored in the breach rather than in the observance. Based upon my experience with other cities in cases similar to this one, the number of formal civil cases alleging use of excessive force by police officers filed against the City of Chattanooga indicates that written regulations to the contrary notwithstanding, at the time and place in question Chattanooga Police Department uniformed officers acted within informal, unwritten policy, practice, or custom wherein the unlawful use of force - the use of excessive force - was tolerated. In my experience, this "culture" must necessarily have been known to Chattanooga Police Department supervisory personnel, and condoned by them. That the Chattanooga Police Department condoned unlawful use of force, such as that utilized by Officer Abernathy at the time in question, is aptly illustrated by the fact that Captain Janet Crumley, of Internal

> Affairs, recommended that Officer Abernathy's shooting of Mr. Thomas be ". . . carried as justified."

[Court File No. 29, Davidson affidavit].

In their response to defendant's motion for summary judgment, plaintiffs assert:

> The Affidavits filed by the City in support of its Motion seek to establish that the City's written policies do not condone the use of excessive force, and that in any event Officer Abernathy had no prior excessive force complaints against him. The Affidavit of plaintiff's attorney shows that in nine years, 45 civil suits against a police force of about 450 uniformed officers have been filed in federal court, and other such suits have been filed in state court. The Exhibit to that Affidavit establishes that the Internal Affairs Division of the Chattanooga Police Department ruled the incident in question a "good shooting." The Affidavit of plaintiffs' expert establishes that in his opinion, the facts thus far adduced . . . show that there existed a policy, custom, or practice permitting the use of excessive force among uniformed Chattanooga policemen.

[Court File No. 29, pp. 3-4].

Thus, the plaintiffs allege that the City has a policy, practice or custom which condones the use of excessive force by its officers based upon the City's finding that the shooting in this incident should be considered as justified. In other words, the City took no disciplinary action against Officer Abernathy for this shooting. Thus, plaintiff's allegation is essentially that the City has a policy, custom or practice of

inaction; namely, that the City has a policy, practice, or custom which condones the excessive force by its officers by taking no adverse disciplinary action against them.

To establish municipal liability based upon an "inaction" theory, the plaintiff must show:

> I. the existence of a clear and persistent pattern of [unconstitutional activity];
>
> II. notice or constructive notice on the part of [officials];
>
> III. [officials'] tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
>
> IV. that the [officials'] custom was the "moving force" or direct causal link in the constitutional deprivation.

Warren v. Shelby County, Tenn., 191 F. Supp.2d at 987 (citing *Doe*, 103 F.3d at 508). Finally, "the evidence must show that "the need to act is so obvious that the [officials'] 'conscious' decision not to act can be said to amount to a 'policy' of deliberate indifference to [the plaintiffs] constitutional rights." *Id.* In this situation, "'deliberate indifference' does not mean a collection of sloppy or even reckless oversights, it means evidence showing an obvious, deliberate indifference to" the use of excessive or deadly force. *Doe*, 103 F.3d at 508.

Where the plaintiff "advances sufficient evidence to create a genuine issue of material fact as to the existence of such

custom or policy, then the question of "deliberate indifference" becomes one for the jury to decide and not for the court at the summary judgment stage." *Id.* at 509 (citing *Hicks v. Frey*, 992 F.2d 1450, 1456-57 (6th Cir. 1993)).

Further, in *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), *cert. denied*, 523 U.S. 1118, 118 S. Ct. 1796, 140 L. Ed. 2d 936 (1998), the Sixth Circuit stated:

> While a municipality may be held liable under 42 U.S.C. § 1983, for a constitutional violation directly attributable to it, § 1983 does not impose vicarious liability on a municipality for the constitutional torts of its employees. *See Monell v. Department of Soc. Servs. of the City of New York*, 436 U.S. 658, 692, 98 S. Ct. 2018, 2036-37, 56 L. Ed. 2d 611 (1978). Therefore, in order to state a claim against a city or a county under § 1983, a plaintiff must show that his injury was caused by an unconstitutional "policy" or "custom" of the municipality. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81, 106 S. Ct. 1292, 1298-99, 89 L. Ed. 2d 452 (1986). The plaintiffs both assert they were injured by the municipalities' allegedly deficient training programs. Where, as here, the identified policy is itself facially lawful, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 1390, 137 L. Ed. 2d 626 (1997)(quoting *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412 (1989)). "Deliberate indifference' is a stringent standard of fault requiring proof that a municipal actor

> disregarded a known or obvious consequence of his action." *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 117 S. Ct. at 1391, 137 L. Ed. 2d 626. In other words, the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be "plainly obvious." *Id.* 520 U.S. 397,117 S. Ct. at 1393.

Stemler, 126 F.3d at 865.

In this action, "the plaintiff's theory of recovery in this case is predicated on the existence of a custom or practice of the unlawful and unconstitutional use of excessive force by the Chattanooga Police Department." [Court File No. 28, Affidavit, p. 2]. The plaintiffs have identified the relevant policy at issue in this case, Chattanooga Police Department - Policy Manual, ADM-5-Use of Force. [Court File No. 33, Exhibit 2]. ADM-5 states in relevant part:

II. USE OF FORCE

> A. Officers of the Chattanooga Police Department shall use only the minimum level of force necessary to conduct lawful public safety activities and accomplish the mission of the department. The level of force used by a police office in any given situation is dependent on the level of resistance presented by the person with whom the officer is dealing. An officer shall only use the minimal amount of physical force reasonably necessary to (1) protect persons and property and (2) overcome any physical resistance offered by a person with whom the officer is dealing. Under no circumstances shall the force used be greater than necessary to achieve lawful objectives. Deadly force shall not be used unless an officer reasonably believes

it is necessary to protect the officer or another person from imminent danger of death or serious physical injury. **[1.3.1, 1.3.2]**.

B. Officers are authorized to use only the minimal amount of force which is reasonably necessary to (1) protect themselves or others, (2) effect an arrest, or (3) maintain control of an arrested person. Officers must always use the minimum amount of force necessary to accomplish these objectives. Any officer who uses force against any person must be able to articulate the specific reason(s) for using the force and must be able to articulate specific reasons for employing the amount of force used. **[1.3.1]**

. . .

D. Use of Force Continuum

1. Whenever possible, police officers shall employ a progression of force commonly referred to as the "use of force continuum." The continuum is based on the concept of increasing the police officer's level of control in response to the level of resistance on the suspect or violator. If a suspect or violator increases his level of resistance or threat to the officer, the office is justified in increasing his level of control.

2. Due to the varying circumstances of different incidents, it is not always possible for an officer to start at the beginning of the use of force continuum and increase the level of force through each level of control.

> 3. Officers may be required and may be fully justified in using force that falls at any point on the continuum based on the circumstances. Allowances must be made for the fact that officers are often forced to make split-second decisions about the amount of force that is necessary in a particular situation or circumstances that are tense, uncertain and rapidly evolving . . .

. . .

G. Firearms

2. Usage Criteria

> a. The use of deadly force is authorized when an officer reasonably believes that its use is necessary in order to stop an imminent threat of serious bodily harm or death against the officer or another person. **[1.3.2]**
>
> b. An Officer's decision to use deadly force will be judged only on what information and observations were known to the officer at the point when deadly force was used.

[Court File No. 33, ADM-5].

Nothing in these policies of the City of Chattanooga is facially unconstitutional. However, plaintiffs have submitted the Affidavit of their "expert" witness, Phillip L. Davidson. [Court File No. 33] Accompanying, the Davidson affidavit are 7 pages of citizen use of force complaints filed by citizens against various officers of the Chattanooga Police Department. [Court File No. 33, Exhibit 1, pp. 1-7].

As part of their response to the defendant's motion for a summary judgment, the plaintiffs submitted the videotaped deposition of Captain Janet Crumley, which was taken on August 20, 2003. [Court File No. 40, Supplemental File][1]. Captain Crumley was the Commander of the Internal Affairs Department on May 28, 2000. *Id.* At the time of her video deposition she had been employed by the Chattanooga Police Department for approximately 28 years.

During the course of her videotaped deposition, at approximately 5:11 P.M. on August 20, 2003, Captain Crumley was shown the list of use of force injury complaints which is attached to the Davidson affidavit and she was extensively questioned about the list. She explained that the complaints on the list involved any use of force where an injury was alleged and that these complaints ran the gamut from a broken fingernail or a scratch to a shooting. *Id.* Plaintiff's counsel noted that there were about 33 complaints on the first page of the list, and for the sake of brevity, he asked Captain Crumley to assume that each of the pages of the list, except for the seventh page which covered about one-quarter of a page, contained approximately 30 complaints per page. *Id.* Captain Crumley reviewed the list and found approximately 11 out of 180 complaints where the officers use of force had been found not to be justified based upon the policies of the Chattanooga Police Department. Captain Crumley further noted as a result of her review of the list that some of the complaints, particularly those on the sixth and

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[1] In submitting the videotapes, the plaintiffs explained that a transcript of the deposition of Captain Crumely was being prepared but had not yet been completed. Prior to the preparation of this Memorandum, the Court listened to the three videotapes, which contain slightly more than 4 hours of testimony, in their entirety.

seventh page of the list were too recent for the investigation of the complaint to have been completed or for the complaint to have been resolved. *Id.* Captain Crumley further noted that there were a number of different resolutions of the complaints on the list: a number had been made and then withdrawn; some had been found to be unfounded, and some had been found to be not sustained, which meant that there was some conflicting evidence but there was not enough evidence for a conclusion to be reached as to whether or not the use of force was or was not justified. *Id.*

In his affidavit, Philip Davidson states:

> Officer Abernathy's actions at the time and place in question do no comply with the City of Chattanooga's written procedures. It is my experience that insofar as use of force is concerned, written regulations are often honored in the breach rather than in the observance. Based upon my experience with other cities in cases similar to this one, the number of formal civil cases alleging use of excessive force by police officers filed against the City of Chattanooga, and more particularly the Chattanooga Police Department's internal records regarding use of excessive force complaints from citizens and the internal "resolution" of those complaints indicated that written regulations to the contrary notwithstanding, at the time and place in question Chattanooga Police Department uniformed officers acted within an informal, unwritten policy, practice, or custom wherein the unlawful use of force -- the use of excessive force -- was tolerated and officially condoned. In my experience, this "culture" must necessarily have been known to Chattanooga Police Department supervisory personnel and condoned by them. That the Chattanooga Police

> Department condoned unlawful use of force, such as that utilized by Officer Abernathy at the time in question, is aptly illustrated by the fact that Captain Janet Crumley, of Internal Affairs, recommended that Officer Abernathy's shooting of Mr. Thomas be ". . .carried as justified."

[Court File No. 33, Davidson Affidavit]. Mr. Davidson's affidavit refers to an affidavit submitted by counsel for the plaintiff. [Court File No. 28]. That affidavit states in pertinent part:

> Research recently performed at my direction in the office of the Clerk of the United States District Court for the Eastern District of Tennessee, Southern Division (Chattanooga) revealed that since July of 1994, at which time the Clerk's records were computerized, revealed that in that period some 45 suits alleging use of excessive unlawful force by the Chattanooga Police Department were filed . . . Additional research performed at my direction reveals that at present, the City of Chattanooga employs 448 uniformed police officers, and that this number has varied little in recent years.

Id.

Plaintiffs also assert that the report of Captain Janet Crumley of the Internal Affairs department of the Chattanooga Police Department shows that the Department had an unwritten policy of condoning excessive and unconstitutional force.

Captain Janet Crumley's Internal Affairs Report involving the shooting at issue in this case states in its entirety:

I have reviewed Sergeant Charles Russell's investigative report on a police involved shooting that occurred on May 28, 2002 at 4806 Hal Drive. According to the investigation, Officer Reginald Abernathy was dispatched to a disorder call at that address. He heard someone screaming inside the residence as he approached. Officer Abernathy entered the fenced yard area and looked through a side door window. He observed a white male and a white female inside the residence. The male was armed with a handgun in each hand. Officer Abernathy observed the male turn the weapons toward the female. He issued a verbal warning through the closed door. When the man did not respond and drop his guns, Officer Abernathy decided to fire his weapon to protect the woman. He fired through the door glass and struck the male later identified as Jon Eric Thomas who resided at the location. The female was identified as his wife, Heather Thomas. Mr. Thomas was transported to Erlanger Hospital where he was admitted.

Sergeant Russell responded to the scene of the shooting where he monitored the investigation of the Major Crimes Unit and the Crime Scene Unit. The inquiry included a review of all the records, reports, diagrams, photographs and witness statements relating to the incident. Sergeant Russell attempted to interview Heather Thomas but was unable to make contact with her. Ms. Thomas declined to be interviewed by Chattanooga Police Department officers throughout the investigation.

Sergeant Russell determined that Officer Abernathy fired his Department issued duty weapon and that he

was using approved ammunition. He had qualified with the gun on April 2-3, 2002, and a projectile from his weapon is on file with the Department Range Master as required by policy.

ADM-5 - Use of Force, III, E, 2, a states "The use of deadly force is authorized when an officer reasonably believes that its use is necessary in order to stop an imminent threat of serious bodily harm or death against the officer or another person." The investigation shows that Officer Abernathy observed Jon Eric Thomas turn toward Ms. Thomas with a weapon in each hand. Abernathy fired after Thomas did not respond to his verbal warning.

Based on the investigation, it is my opinion that Officer Abernathy fired his weapon to protect Heather Thomas from what he reasonably believed to be an imminent threat of serious bodily harm or death at the hands of Mr. Thomas. His actions were in compliance with Department policy and I recommend this case be carried as *justified*.

[Court File No. 33, Exhibit 3](emphasis in original).

Mr. Davidson filed a supplemental affidavit on September 2, 2003, which states in pertinent part:

It is my considered opinion that, as articulated in my August 8, Affidavit, the fact that Captain Crumley determined that the shooting in question was "justified" is clear evidence that at the time this incident occurred, use of excessive force by uniformed police officers was condoned by senior officers of the Chattanooga Police Department. This

shooting violated both the Use of Force requirements and the Use of Force Continuum . . .

Captain Crumley wholly ignored Officer Abernathy's firing sequence (i.e., did he evaluate before firing the first shot? Did he re-evaluate after firing the second, third, fourth, fifth, sixth and seventh shows without interruption?). This is completely at odds with the written policy guidelines. . .Although Officer Abernathy has admitted both under oath in his deposition and in his contemporaneous statement to Sgt. Mathis that he gave no warning before opening fire on Mr. Thomas, and that Mr. Thomas posed no threat to him, Captain Crumley's report concludes that he did warn before shooting. . . Her error is plain. . .

In summary, Captain Crumley's report does not address the fact that in his contemporaneous statement given to Sgt. Mathis, Officer Abernathy clearly conceded that he gave no warning. Captain Crumley's omission of critical evidence and her failure to determining what Officer Abernathy himself reported can lead only to the conclusion that her report was intended to be uninformative. In my opinion, no experienced police supervisor could reasonably have concluded that Officer Abernathy's actions at the time in question were in keeping with the Chattanooga Police Department's written policies and procedures concerning the use of force. In my opinion, Captain Crumley's report provides a clear insight into the Chattanooga Police Departments "customary" method of preparing excessive force reports, and forwarding inaccurate reports . . .

> My conclusion is this respect is further supported by the statistical data [referred to in my Affidavit of August 8, 2003] concerning the number of excessive force complaints received by the Chattanooga Police Department and the internal police department "resolution" of those complaints, which Captain Crumley confirms . . . These statistics, provided in this case by the Chattanooga Police Department, show that in the past fifteen years the Chattanooga Police Department receives an excessive force complaint approximately every 12 days and deems such as [sic] complaint as being "justified" approximately every 10 months. The percentage of complaints deemed "justified" by the Chattanooga Police Departments is approximately 4.2. It is further my considered opinion that absent the Chattanooga Police Department's unwritten practice, custom or policy of condoning unlawful and unconstitutional use of excessive force, the shooting which is the subject of this litigation more likely than not wouldn't have occurred.

[Court File No. 38].

With regard to the "statistical" evidence allegedly set forth in the two affidavits of plaintiffs' "expert" witness, Phillip Davidson, the court notes that these statements are wholly conclusory statements of Mr. Davidson's opinion. At no point does Mr. Davidson set forth the basis or reasoning behind his opinion.

Further, Mr. Davidson refers to the list of use of force complaints filed with the Chattanooga Police Department and makes certain conclusory statements to the effect that this list shows that the Chattanooga Police Department has an unwritten policy of condoning the use of excessive and

unconstitutional use of force by its officers. However, other than the statement that the Chattanooga Police Department receives an excessive force complaint approximately 12 days and, as a result of the Internal Affairs investigations into those complaints, concludes that an excessive force complaint is justified or "founded" approximately every 10 months, Mr. Davidson again provides no reasoning or basis for his conclusion that the Chattanooga Police Department has an unwritten policy of condoning excessive force.

First, if the Chattanooga Police Department finds a complaint of excessive force to be justified or well-founded approximately every 10 months, it obviously does not have a policy of denying all excessive force claims or sweeping them under the carpet. More importantly, Mr. Davidson simply bases his conclusory allegations upon the list of claims, the Court is not provided with any other information about the excessive force claims. For instance, Captain Crumley testified that the claims on the list of claims involved any claim of excessive force from a shooting to a broken fingernail or a scratch. However, Mr. Davidson has not informed the Court as to the number of excessive force claims on the list actually involve a shooting of the use of deadly/potentially deadly force as does this case. Further, Mr. Davidson provides no data upon which the Court could compare or contrast the number of excessive force complaints made by citizens in Chattanooga with the number of excessive force complaints in similarly sized cities or in cities with a similarly sized police force.

Thus, the "statistical evidence" referred to in Mr. Davidson's affidavit and supplemental affidavit does not show that official in the City of Chattanooga Police Department had a policy of condoning the use of excessive force. Here, plaintiffs have submitted no evidence showing that officials of

the Chattanooga Police Department were confronted with such evidence of the use of excessive and/or deadly force by their patrol officers that "the need to act was so obvious that the 'conscious' decision not to act was a 'policy" of deliberate indifference to the plaintiffs' constitutional rights. *Warren*, 191 F. Supp.2d at 987.

Likewise, Mr. Davidson does not explain his reasoning for his opinion that no experienced police supervisor could reasonably have concluded that Officer Abernathy's actions at the time in question were in keeping with the Chattanooga Police Department's written policies and procedures concerning the use of force. Rather, he attacks certain deficiencies in Captain Crumley's Internal Affairs recommendation that the shooting by Officer Abernathy be carried as justified.

First, Mr. Davidson notes that in her case recommendation, Captain Crumley stated that Officer Abernathy "issued a verbal warning through the closed door" before he fired. Mr. Davidson notes that this recommendation ignores Officers Abernathy's statements that he gave no warning. [Court File No. 38].

Captain Crumley was extensively questioned about this issue during her August 20, 2003 deposition. During the deposition Captain Crumley stated in her role as Commander of Internal Affairs she performed no investigation of complaints, with one exception which does not apply to this case, and that she primarily relied on the Report of Sergeant Charles Russell when she prepared her recommendation, although she did acknowledge she had reviewed other documents. [Court File No. 40]. Captain Crumley's case recommendation does state: "I have reviewed Sergeant Charles Russell's investigative report on a police involved

shooting that occurred on May 28, 2002 . . ." [Court File No. 33, Exhibit 3, p. 1]. Furthermore, during her deposition, Captain Crumley was asked to review Sergeant Russell's report and she did read from a portion of the report which concluded that Officer Abernathy did give a verbal warning through the door prior to the shooting.

When asked to explain the discrepancy, Captain Crumley stated she had discussed the matter with Sergeant Russell and believed it had been resolved at the time she wrote her report on or about February 2003, Further, she noted that Mrs. Thomas had never spoken to an investigator from Internal Affairs and at the time she prepared her case recommendation she did not have access to Officer Abernathy's affidavit. More importantly, Captain Crumley stated that even if she had been aware that Officer Abernathy had not given a verbal warning, that would not necessarily have changed her ultimate conclusion. Captain Crumley stated that in her opinion the primary issue was the issue of justification for the shooting and that the justification in this case came from the perceived threat to Heather Thomas. Thus, she stated that her conclusion that the shooting was justified was based primarily upon her conclusion that Officer Abernathy fired his weapon based upon what he perceived to be an imminent threat of serious bodily harm or death to Heather Thomas from the gun or guns that Eric Thomas was pointing at her. Captain Crumley's report concludes, that "based on the investigation, it is my opinion that Officer Abernathy fired his weapon to protect Heather Thomas from what he reasonably believed to be an imminent threat of serious bodily harm or death at the hands of Mr. Thomas. [Court File No. 33, Exhibit 3].

Further, Captain Crumley noted that while she reviewed a number of materials that she reviewed when she prepared her recommendation she did not have before her any of the

depositions of the parties to this case and that Heather Thomas had refused to speak to an Internal Affairs investigator, for reasons which are unrelated to this action. Moreover, as to her own recommendation concerning Officer Abernathy's use of force, Captain Crumley was to required to apply the written policy of the Chattanooga Police Department which states that:. an Officer's decision to use deadly force will be judged only on what information and observations were known to the officer at the point when deadly force was used. [Court File No. 33, ADM-5].

There is nothing in this aspect of the policy of the Chattanooga Police Department which is unconstitutional or bespeaks of "deliberate indifference." The Court would note that in *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989), the Supreme Court stated in judging the reasonableness of a police officers use of force in the Fourth Amendment context that:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick*, 481 F.2d 1028, 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

Id.

In his supplemental affidavit, Mr. Davidson is critical of Captain Crumley's reports. He further states that in his opinion, "no experienced police supervisor could reasonably have concluded that Officer Abernathy's actions were in keeping with the Chattanooga Police Department's written policies and procedures concerning the use of force." [Court File No. 38].

However, Mr. Davidson states neither the basis nor the reasoning behind his conclusory allegations. Most importantly, Mr. Davidson does not set forth the evidence upon which his conclusory opinion was based; namely, he does not state whether he based his conclusory opinion upon evidence that was unavailable to Captain Crumley at the time she authored her case recommendation, such as the depositions of the parties and/or a statement of the plaintiffs' version of the events from Heather Thomas, or whether his opinion is based upon the evidence that was available to Captain Crumley, such as Sergeant Russell's Investigative Report.

Moreover, with regard to Mr. Davidson's criticisms of the quality of Captain Crumley's recommendation, the Court notes that Captain Crumley's written recommendation was not based upon the same evidence that is currently before this Court; namely, she testified that she did not have the depositions of the parties and that, despite efforts to obtain a statement from her, Heather Thomas would not speak to an investigator from Internal Affairs[2]. However, she testified that

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[2] Captain Crumley also testified that the Internal Affairs investigation in this instance was an administrative investigation; namely it was an automatic investigation that was triggered because Officer Abernathy used potentially deadly force. According to

her Internal Affairs recommendation was prepared in the customary manner that she prepared other reports and Captain Crumley[3] also testified that in issuing her case

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Captain Crumley's deposition testimony, this differs from the situation where the Internal Affairs investigation is triggered by a citizen complaint concerning the use of force, because in that situation the citizen must provide the police department with a written statement setting forth the details of their complaint before an investigation is commenced by Internal Affairs. Thus, in this situation when Captain Crumley authored her case recommendation, she had neither a written statement from the plaintiffs, nor had an investigator from the Internal Affairs Division of the Chattanooga Police Department been able to speak with Heather Thomas.

[3] In his supplemental affidavit, Mr. Davidson also sets forth his opinion/conclusion that Captain Crumley is a policymaker for purposes of municipal liability under *Monell*, because she is/was a high ranking member of the Chattanooga Police Department, i.e., at the time she issued her case recommendation she was the commander of the internal affairs division of the Chattanooga Police Department. However, Captain Crumley testified that after she authored her case recommendation, the written case recommendation and certain other documents, including the report of the Internal Affairs investigator assigned to the case, the report of the major crimes division and certain other forms from the Chattanooga Police Department, were forwarded to Deputy Chief Charles Cook and Chief of Police James Dotson both of whom had to approve the recommendation -- in Captain Crumley's words "sign off on" the recommendation -- before it became final. [Court File No. 40]. In this situation, Captain Crumley testified that Chief Dotson approved/accepted the recommendation sometime in March 2003, and it became final at that time. Thus, it is not at all clear to the Court from the limited amount of evidence in the record on this issue that Captain Crumley was a policymaker for purposes of municipal liability under *Monell*.

recommendation it was her usual practice to primarily rely on the investigation report by the internal affairs investigator assigned to the case[4].

In this case, Officer Abernathy was dispatched to the plaintiff's home shortly before midnight on May 28, 2000, in response to a domestic disorder call. As he approached the home, he was met by a neighbor who pointed to the plaintiff's home and told him there was a domestic disorder at the home. As Officer Abernathy approached the house, he heard screaming from inside the home.

He approached the side door of the house, the kitchen door, because he saw a light coming through the window in the upper portion of the door onto the porch. As he looked through the door, Officer Abernathy saw a male and female. They were speaking to each other, but Officer Abernathy could not overhear the conversation through the door. Sitting

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[4] The Court further notes that although Captain Crumley testified that in preparing her written case recommendation she relied on various documents, primarily the report of Internal Affairs investigator Sergeant Charles Russell as well as the report of the major crimes unit, which investigated the May 28, 2000 shooting. Neither of these reports appears in the record. However, when Captain Crumley was asked how she concluded that Officer Abernathy issued a verbal warning before the shooting, she stated that was based upon statements found in Sergeant Russell's report. She was then asked to review Sergeant Russell's report and did read from the report Sergeant Russell's statement that Officer Abernathy did issue a verbal warning before shooting. [Court File No. 40]. Thus, the Court has before it no evidence suggesting that Captain Crumley either selectively or incorrectly summarized the evidence in the reports upon which she based her case recommendation.

on the counter top of the kitchen were two rifles and the male held a handgun in each hand.

At some point, Officer Abernathy observed the male turn toward the female with a gun in each hand; and, he lost sight of the gun in the man's left hand. He could not hear what was being said between the two, but Officer Abernathy perceived the woman's body language/expression as showing that she was in danger. [Court File No. 24, p. 105]. Believing that the woman was in imminent danger, Officer Abernathy opened fire on the man and kept firing until he perceived the danger from him had ceased.

Based upon the evidence available to Captain Crumley at the time she wrote her case recommendation and given the fact that the policy of the Chattanooga Police Department required Captain Crumley to assess the situation "only on what information and observations were known to the officer at the point when deadly force was used," [Court File No. 33, ADM-5, Subsection G.2.b], Captain Crumley's recommendation with regard to the May 28, 2000 shooting does not fall so far out of the realm of reason as to suggest that the Chattanooga Police Department was "deliberately indifferent" to the plaintiffs' rights in that it had an unwritten custom or policy of condoning the excessive use of force by its officers[5].

Where, as here, the plaintiffs' allege a custom or policy based upon the failure of the City of Chattanooga Police

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[5] In making this statement, the Court does not mean in any way to suggest that it views Captain Crumley's recommendation as unreasonable in any way.

Department to take any disciplinary action against Officer Abernathy as the result of the May 28, 2002 shooting,

> the evidence must show that the need to act was so obvious that the . . . "conscious decision" not to act can be said to amount to a "policy" of deliberate indifference to [the plaintiffs'] constitutional rights. *City of Canton*, 489 U.S. at 389, 109 S. Ct. at 1205. "Deliberate indifference" in this context does not mean a collection of sloppy, or even reckless oversights; it means evidence showing an obvious deliberate indifference to [the alleged constitutional violation].

Doe v. Claiborne County, Tenn. By and Through Claiborne County Bd. of Education, 103 F.3d 495, 509 (6th Cir. 1996).

Here, neither Captain Crumley's written recommendation, nor the conclusory opinions and "statistical" analysis set forth in the Affidavit and Supplement Affidavit of plaintiffs' Rule 26 expert witness, Phillip L. Davidson, even when viewed in the light most favorable to the plaintiffs, are sufficient to establish a genuine issue of material fact of "deliberate indifference" on the part of the City of Chattanooga or its Police Department which would constitute an unwritten custom or police which encourages or condones the use of excessive force of the part of officers of the Chattanooga Police Department. Accordingly, the motion of defendant, the City of Chattanooga, for a summary judgment [Court File No. 24] will be **GRANTED**.

IV. Defendant's Motion to Disqualify Phillip L. Davidson as an expert witness [Court File No. 36].

Also pending before the Court is the motion of defendant, the City of Chattanooga, Tennessee, to disqualify Phillip L. Davidson as an expert witness on the ground that his proposed/proffered testimony fails to satisfy the requirements for expert witness testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). [Court File No. 36]. In the alternative, defendant, the City of Chattanooga, seeks to exclude the FED. R. CIV. P. 26 disclosures of its expert witness, Phillip L. Davidson, on the ground that plaintiffs did not disclose Phillip L. Davidson nor provide any Rule 25 disclosures from him to the City of Chattanooga until June 16, 2003, and made supplemental disclosures on July 29, 2003 and August 8, 2003, well beyond the deadline for the plaintiffs' Rule 26 expert testimony set forth in this Court's Scheduling Order of November 29, 2002 [Court File No. 7], which was April 11, 2003. [Court File No. 37].

In view of this Court's finding, set forth in detail above, that the City of Chattanooga is entitled to a summary judgment on plaintiff's claims against it, the City of Chattanooga's *Daubert* motion to disqualify the plaintiffs' expert witness, Phillip L. Davidson, [Court File No. 36] has been rendered **moot**.

A separate order will enter.

09-16-03 /s/_____

R. ALLAN EDGAR
CHIEF UNITED STATES DISTRICT JUDGE

ORDER

In accordance with the accompanying memorandum, opinion defendant's motion for a summary judgment [Court File No. 24] is **GRANTED**. The plaintiff's claims are **DISMISSED WITH PREJUDICE**. The defendant is entitled to **JUDGMENT** in its favor. Costs are awarded to the defendant. The Clerk shall close the file.

SO ORDERED.

ENTER.

09-16-03 /s/ _____

R. ALLAN EDGAR
CHIEF UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 8 - 2005
OFFICE OF THE CLERK

(2)

No. 04-1478

In the Supreme Court of the United States

JOHN ERIC THOMAS, *et ux,* HEATHER THOMAS,
Petitioners,

v.

THE CITY OF CHATTANOOGA, TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT CITY OF CHATTANOOGA'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether the Sixth Circuit correctly held that plaintiffs' expert testimony did not create a factual question for trial on the existence of a policy, custom, or practice and properly affirmed the Summary Judgment granted to the municipal defendant by the District Court after considering *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993) and *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978).

2. Whether the Sixth Circuit opinion conflicts with the decisions of another United States Court of Appeals to the extent that there is a compelling reason to grant the Petition.

LIST OF ALL PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all the parties involved in this matter.

The City of Chattanooga is a municipal corporation and has no parent companies or non-wholly owned subsidiaries required to be disclosed under Supreme Court Rule 29.6.

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The opinion of the United States Court of Appeals for the Sixth Circuit was recommended for full-text publication. It is reported at *Thomas, et ux. v. City of Chattanooga,* 398 F.3d 426 (6th Cir. 2005).

STATEMENT OF JURISDICTION

Respondent, City of Chattanooga, adopts and incorporates the Statements of Jurisdiction set forth in the Petition for Writ of Certiorari filed by Petitioners, JOHN ERIC THOMAS, *et ux,* HEATHER THOMAS.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Respondent City of Chattanooga adopts and incorporates the Constitutional provisions, treaties, statutes, ordinances and regulations involved set forth in the Petition for Writ of Certiorari filed by Petitioners, JOHN ERIC THOMAS, *et ux,* HEATHER THOMAS.

STATEMENT OF THE CASE

The City of Chattanooga was originally sued for $25,000,000.00 in compensatory and punitive damages in the Eastern District of Tennessee on August 5, 2002 by Attorney Robert J. Shockey, representing the plaintiffs John Eric Thomas and wife, Heather Thomas. The original complaint asserted claims arising out of the Due Process Clause of the Fourteenth Amendment to the United States Constitution under 42 U.S.C. § 1983. The complaint asserted that the actions of Officer Abernathy ("Abernathy") in a single police

shooting incident resulted in the deprivation of civil rights of Eric Thomas to be free from excessive and unreasonable force, to be deprived of liberty without due process, and to be free from summary punishment. Abernathy was never sued as a party defendant in any capacity. The original complaint asserted that the City of Chattanooga was liable for the wrongful acts of Abernathy by virtue of the doctrine of *respondeat superior*.

A Scheduling Order was entered on November 29, 2002 following the conference held on November 25, 2002. The Scheduling Order made specific deadlines for Expert Disclosures and provided for a *Daubert* hearing to determine the admissibility of expert testimony provided that motions were filed by certain deadlines. The Scheduling Order further established dispositive motion deadlines and joinder deadlines. Plaintiffs did not file any expert disclosures on or before April 11, 2003 as required by the Scheduling Order. Appellee filed a motion to extend its deadline for expert disclosures and dispositive motions on May 14, 2003 and also filed limited expert disclosures on May 15, 2003. Appellee's expert disclosure deadline was extended until June 15, 2003 and its dispositive motion deadline was extended until July 11, 2003 by orders entered May 20 & 22, 2003.

On June 10, 2003, Appellants filed a motion to amend the complaint. On June 16, 2003, Appellants filed an expert statement of Phillip L. Davidson. On June 22, 2003, the Magistrate granted Appellants' motion to extend the time for taking of depositions until September 1, 2003 and granted defendant's motion to extend the *Daubert* motion filing deadline until September 1, 2003 and granted Appellants' motion to amend the complaint. An amended complaint was filed on July 10, 2003. The amended complaint contains a new paragraph 12 and 13 which reads as follows:

12. Officer Abernathy's wrongful and tortuous conduct, as described hereinabove, was in violation of T.C.A. 39-11-620, in that he failed to identify himself as a police officer prior to opening fire, failed to warn, failed to exhaust all other reasonable means of apprehension, and had no probable cause to believe that Eric Thomas posed a threat of serious bodily injury or had committed a felony involving the infliction or threatened infliction of serious bodily injury, and in that Eric Thomas was not fleeing at the time in question.

13. The City of Chattanooga is liable to plaintiffs by virtue of having, within its Police Department, a practice, policy, custom or usage of unlawful excessive force by Police Officers.

No additional parties were added or requested to be added in the amended complaint. On July 11, 2003, defendant City of Chattanooga filed its motion for judgment on the pleadings and/or for summary judgment with supporting affidavits and portions of the deposition of Abernathy. On July 31, 2003, Appellants filed a memorandum in opposition to defendant's summary judgment motion with an affidavit of Davidson and Shockey. An Affidavit of Davidson was filed on August 11, 2003. Portions of the deposition of Davidson taken on August 19, 2003 were filed on August 29, 2003 by defendant City of Chattanooga in support of its motions. A later supplemental affidavit of Davidson was filed on September 2, 2003 following his deposition. A supplemental affidavit of Charles Russell ("Russell") was filed by Appellee on September 8, 2003. The entire deposition of Janet Crumley ("Crumley") was filed on September 10, 2003.

A memorandum with order and judgment dismissing this case against the City of Chattanooga with prejudice was entered by Chief Judge R. Allan Edgar on September 16, 2003. A notice of appeal was filed by plaintiffs on September 19, 2003. The Sixth Circuit rendered its Judgment affirming the decision of the District Court on February 9, 2005. A Petition was filed with this Court on May 5, 2005. This Court has granted an extension until July 8, 2005 within which to file a Brief in Opposition to the Petition. This brief is timely filed by the City of Chattanooga in accordance with the Order entered by this Court.

STATEMENT OF THE FACTS

On May 28, 2002, Officer Reginald Abernathy responded to a dispatched domestic disorder call sometime after 12:30 a.m. at 4805 Hal Drive in Chattanooga, Tennessee. Abernathy was advised by dispatch that someone was riding up and down in a truck, hollering and screaming and burning rubber in the street. Abernathy heard loud screaming when he was directly in front of the driveway leading to the Thomas' house. Abernathy observed a man and a woman arguing in the kitchen and two rifles were observed on the counter top in the kitchen. The man was observed with a handgun in each of his hands. Eventually, after observations by Officer Abernathy over several seconds of the activities in the kitchen, Abernathy determined that the woman's life was in imminent danger. Abernathy eventually fired at the man's left arm and shot multiple continuous rounds through the glass window of the kitchen door. After the shooting incident, Abernathy remained outside the residence until his sergeant arrived at the house and John Eric Thomas was eventually discovered injured in the home.

The record clearly established that Abernathy had never shot any other individual in his work for the Chattanooga Police Department for more than ten years prior to this incident. Abernathy had received video training in the use of deadly force from the Chattanooga Police Department while in the Police Academy. Abernathy had no founded Internal Affairs complaints or disciplinary action for any matter in his 10 years of employment. Abernathy testified that he had received training from the Chattanooga Police Department to announce himself as a police officer before using deadly force, but Abernathy stated that he did not think that there was enough time to announce himself as a police officer on the evening in question, based upon the circumstances of the dangerous condition which he observed.

Despite initially relying on the theory of *respondeat superior* in the initial Complaint, petitioners eventually submitted multiple affidavits of Phillip L. Davidson, an expert witness. Davidson relied upon court records and an affidavit from petitioner's attorney that 45 lawsuits alleging use of force against the Chattanooga Police Department had been filed in the United States District Court between July of 1994 and July of 2003. Davidson opined that based upon his experience with other cities similar to this one, the number of formal cases alleging use of excessive force by police officers indicates that written regulations to the contrary notwithstanding, at the time and place in question, Chattanooga Police Department uniformed officers acted within an informal, unwritten policy, practice or custom wherein the unlawful use of force-the use of excessive force -was tolerated.

After submitting his affidavit, Davidson was deposed on August 19, 2003. In that deposition, Davidson stated that he based his opinion in his July 29th Affidavit on Robert

Shockey's affidavit, Exhibits filed in Support of Defendant's Motion for Summary Judgment, the Deposition of Officer Abernathy, and other cases similar to this one. When Davidson was questioned further about any specific cases he based his opinion on, the following exchange took place:

Noblett: Okay. What other cases have you had that were similar to this, sir?

Davidson: In terms of -- when I say similar to this, no case is really similar. We're talking about cases where there have been a lot of lawsuits filed over a period of time against a department. Of course, I looked at the internal affairs recommendation, too.

Noblett: Okay, sir. One of the things that was questioned to me in your affidavit dated July 29th, were your references to experience with other cities and cases similar to this one; I was trying to find out what other cities those might be.

Davidson: Well, I'm sort of between a rock and a hard space here. I can't discuss or reveal the names of clients I've had. Okay.

Noblett: All right, sir.

Davidson: But I can tell you I have filed numerous lawsuits and civil rights cases where one of the allegations have been that there is policy custom and usage of the city in terms of excessive force.

Noblett: So are you trying to rely on your experience as an attorney?

Davidson: That as well as the case that I've actually previously testified in this case as having testified as an expert.

Davidson was asked if he had any information that the Chattanooga Police Department knew before the shooting incident between Officer Abernathy and Eric Thomas that Mr. Abernathy would improperly shoot someone. Davidson answered:

> No. All police departments, that's why they have regulations, that's why they have general orders, because there's an awareness that officers can and in fact do sometimes violate departmental -- violate use of force policy, and can commit excessive use of force. That's why they have these general orders, in hope to control that type of behavior, or at least they can get some guidelines out there.

Davidson was questioned whether any police officer for the City ever told him there was some sort of culture which allowed excessive force to occur and he replied "No." Davidson was then asked:

Noblett: Do you have any evidence that the city of Chattanooga had any policy or practice of not conducting investigations when their officer had a civil citizen complaint against them?

Davidson: With a citizen complaint, I don't have any information that they didn't do that,

because this is the only information that was provided.

Noblett: All right, sir. And I'm talking as to when you gave your affidavit in this case on August the 8th.

Davidson: Right.

Davidson was further questioned about an August 8, 2003 affidavit which was filed by plaintiffs in this case . In that affidavit, Davidson states:

> Subsequent to preparing and executing my affidavit dated July 29, 2003, I have reviewed certain photocopies of some but less than all of the complaints and civil cover sheets of the cases referred to in Mr. Shockey's affidavit of July 29, 2003....I have also reviewed Defendant's Response to the Plaintiffs' Request for Admissions dated June 30, 2003, Defendant's Answers to Plaintiffs' Second Set of Interrogatories and Third Set of Request for Production dated June 30, 2003, the documents produced by the defendant subsequent to the deposition of Captain Mike Williams, and the Defendant's Response to Plaintiffs' Second Request for Production of Documents. The documents exhibited to this latter discovery response – a statistical summary of excessive force complaints made against the Chattanooga Police Department from December of 1988 through and including the present time – are made Exhibit 1 to this affidavit.

Davidson later concluded that:

> Based upon my experience with other cities and cases similar to this one, the number of formal civil cases alleging use of excessive force by police officers filed against the City of Chattanooga, and more particularly the Chattanooga Police Department's internal records regarding use of excessive force complaints from citizens and the internal "resolution" of those complaints indicates that written regulations to the contrary notwithstanding, at the time and place in question, the Chattanooga Police Department uniformed officers acted within an informal unwritten policy, practice or custom wherein the unlawful use of force – the use of excessive force – was tolerated and officially condoned.

The statistical summary of excessive force complaints referred to by Davidson in his August 8, 2003 affidavit simply lists the Internal Affairs investigation number, the type of complaint, and the disposition of the complaint which was requested and provided during discovery. Davidson admitted in his deposition that he did not remember how many of the listed Internal Affairs complaints involved use of deadly force. He admitted that he did not delineate any of his opinions based upon whether or not a complaint involved deadly force. Davidson admitted that he had not reviewed any of the information as to the rulings or verdicts in any of the complaints and civil cover sheets from the Eastern District of Tennessee at the time of his deposition. In addition, Davidson admitted that he had not seen any of the internal investigations or the Internal Affairs reports regarding any complaints listed in the Internal Affairs listings prior to giving his August 8, 2003 affidavit.

In a fourth supplemental affidavit dated August 28, 2003 following his deposition, Davidson concludes that Crumley's omission of evidence allegedly showing that Abernathy gave no warning leads to his conclusion that it was a customary practice to forward inaccurate reports. Crumley explained in her deposition that it is not her role to perform an investigation but to review the investigating officer's report, which in this case was Sergeant Charles Russell. Sergeant Russell concluded in his report that Abernathy did give a verbal warning. Crumley also testified that at the time of her recommendation, she did not have access to Abernathy's affidavit nor the statements of Mrs. Thomas who had refused to speak with Internal Affairs.

The District Court and the Sixth Circuit extensively reviewed all of the contradictory and conclusory statements made by Phillip L. Davidson before determining that his conclusions did not satisfy the requirements of the *Federal Rules of Evidence*, *Daubert* or *Monell*.

REASONS WHY THE PETITION SHOULD BE DENIED

None of the criteria set forth in Supreme Court Rule 10 that could establish a "compelling reason" to grant the petition is present here. Petitioners have failed to identify any way in which the Sixth Circuit's decision either:

(1) conflicts with the decision of another United States Court of Appeals,

(2) decides an important federal question in a way that conflicts with the decision by a state court of last resort,

(3) so far departs from the accepted and usual course of judicial proceedings to justify an exercise of this Court's supervisory power,

(4) decides an important question of federal law previously undecided by the Court, or,

(5) conflicts with relevant decisions of this Court.

Supreme Court Rule 10 specifically provides that a petition for writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The petition for writ of certiorari to this Court in this case is nothing more that a claim by Petitioners that the District Circuit improperly granted summary judgment to the municipal defendant and the Sixth Circuit erred in affirming it because it misapplied properly stated rules of law. It is asserted that the Sixth Circuit either misapplied its own precedent or ruled in a manner with conflicts or *Daubert* or *Monell* or other Courts of Appeals which have interpreted them. Petitioners misinterpret the clear language of this Court in *Daubert* which was correctly interpreted by the Sixth Circuit at page 11a of Appendix A to petitioners Brief. This case is not suitable for review because the decision of the Sixth Circuit below does not conflict with the interpretations of *Daubert* in other United States Courts of Appeals nor with other relevant decisions of this Court. This case is also not suitable for review because the Sixth Circuit did not misapply any rule of law which is otherwise appropriate for review based on Supreme Court Rule 10.

I. The Sixth Circuit Correctly Held That Plaintiffs' Expert Testimony Did Not Create a Factual Question for Trial on the Existence of a Policy, Custom, or Practice and Properly Affirmed the Summary Judgment Granted to the Municipal Defendant by the District Court after Considering *Daubert* and *Monell*.

The Sixth Circuit properly affirmed the summary judgment granted to the City of Chattanooga by the District Court after fully reviewing *Daubert*. The District Court made no initial *Daubert* ruling due to its finding that summary judgment was appropriate under *Monell* because any offered opinions were "wholly conclusory." The Sixth Circuit clearly found that *Daubert* does not require a court to make a credibility determination of expert testimony. *Daubert* does require that any expert witness be able to substantiate his opinion where necessary based upon some facts in the record under Rule 56 when summary judgment determinations have to be made by the Court. The Sixth Circuit properly found that being an expert does not lessen the burden one has in rebutting a motion for summary judgment. In fact "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached...and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it. '" *See* Fed. R. Evid. 702 advisory committee's note; and *Joiner v. General Electric Co.*, 78 F.3d 524, 530 (11th Cir. 1996); *Cook v. American S.S. Co.*, 53 F.3d 733, 738 (6th Cir. 1995); and *Berry v. Detroit*, 25 F.3d 1342, 1349-1350 (6th Cir. 1994).

The Sixth Circuit properly reviewed *Daubert* reliability factors which were adopted by this Court in its opinion before determining that Davidson's conclusions that the City of

Chattanooga must have an unwritten policy of condoning excessive force because of the mere number of complaints previously filed against it, was insufficient to create a genuine issue of material fact on which a jury could reasonable find that such a policy exists. The Sixth Circuit reviewed *Daubert* and *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed. 2d 238 (1999) before coming to the conclusion that Davidson's affidavits simply did not provide any rationale for his conclusions. None of Davidson's affidavits reviewed by the Sixth Circuit are included with the Petition for consideration by this Court.

The Sixth Circuit after reviewing all statements by the plaintiff's expert, Davidson, found that it could not simply take the expert's "word for it" without some identifiable basis for a conclusion. The Sixth Circuit found that Davidson himself stated that "there's no brightline or rule" regarding how many complaints would be excessive against any police department. The Sixth Circuit found that this admission suggested that an expert would need to conduct a more qualitative analysis to develop a conclusion. However, the affidavits nor deposition testimony of Davidson established that Davidson did not conduct such an analysis, and instead in his deposition he merely mentioned a few cases where the courts have let the jury determine whether the municipality had an unwritten illegal policy. Under *Daubert*, statistical evidence must be prepared in a reliable and statistically sound way. *Adams v. Ameritech Services, Inc.* 231 F.3d 414, 425 (7th Cir. 2000). The Sixth Circuit properly found that Davidson did not establish any qualitative analysis of any other case he considered and how they were similar to the present case by any testimony or affidavit which was before that Court. As such, it is respectfully submitted that Davidson did not establish proof of any unconstitutional policy, custom, or practice adopted by any municipal

policymaker which would warrant a trial on the merits. The Sixth Circuit and the District Court below properly found that municipal liability at least since *Monell* requires more than a simple *respondeat superior* standard.

The Sixth Circuit properly found that Davidson's affidavits and deposition testimony in this case did not establish any policy of deliberate indifference resulting from a single shooting incidence by an officer or the Chattanooga Police Department. The Sixth Circuit appropriately considered that municipal liability requires proof of much more than the analysis offered by plaintiff's expert in this record. The record and proof submitted by plaintiff's did not exhibit any clear and persistent pattern of illegal activity by the Chattanooga Police Department. The Sixth Circuit properly found that deliberate indifference "does not mean a collection of sloppy, or even reckless oversights; it means evidence showing an obvious, deliberate indifference" to the alleged violations. *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407, 117 S.Ct. 1382, 137 L.Ed. 2d 626 (1997).

Because Davidson failed to provide any explanation for his reliance on the mere number of excessive force complaints against the Police Department established the existence of any unconstitutional policy, custom or practice by the City of Chattanooga, the Sixth Circuit properly found that the only basis for his opinion that such an unconstitutional practice or custom existed was reduced to the fact's of this case alone. Simply because one person is shot when that person is perceived by the officer to be threatening his wife with two loaded weapons does not establish any unconstitutional policy, custom or practice of a municipal defendant. Since the Sixth Circuit properly applied the decisions from this Court in *Daubert* and *Monell*, this decision does not conflict with any

relevant decision of this Court and this petition should be denied.

II. The Sixth Circuit opinion does not conflict with the decisions of other United States Court of Appeals to the extent that there is a compelling reason to grant the Petition.

The petitioners assert that a conflict exists within the Sixth Circuit between *First Tenn. Bank Nat. Ass'n v. Barrato,* 268 F.3d 319, 331 (2001) and the instant case, *Thomas v. City of Chattanooga*. Both of these cases recognized the gatekeeping functions of the District Court and the holdings in *Daubert* and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999). Conflicts of decisions within the Sixth Circuit may clearly be resolved by the Court below and do not establish any "compelling reason" to grant this petition under Supreme Court Rule 10. There is no material difference in the legal analysis used by the Sixth Circuit in either of these cases to determine whether there was an adequate basis for the admission of expert testimony based on *Daubert* standards. The bottom line in both Sixth Circuit cases is that the District Court's decision on admission of testimony is subject to review on an abuse of discretion standard.

There is no conflict between the Sixth Circuit decision in this case and the Fourth Circuit decision in *Binakonsky v. Ford Motor Co.,* 133 F.3d 281 , 290 (1998). In the Fourth Circuit that court correctly determined that Dr. Korella performed an autopsy. As such he was merely a fact witness not an expert witness. The Fourth Circuit properly found that *Daubert* was inapplicable to fact witnesses who are not offering expert conclusions. Petitioners have made no argument in this case that Davidson was not attempting to provide expert testimony.

Nor is there any conflict between the Sixth Circuit decision in this case and the Ninth Circuit decision in *White v. Form Motor Co.*, 312 F.3d 998 (2002). The Ninth Circuit explicitly recognized the holdings of this court in *Daubert* and in *Kumho* much like the Sixth Circuit decision below. The Ninth Circuit in *White* also recognized that the gatekeeping role of the District Judge extends to all forms of expert testimony and in assessing reliability, depending upon the nature of the issue, the expert's particular expertise, and the subject of his testimony.

Finally, the Eighth Circuit opinion in *U.S. v. Rouse*, 100 F.3d 560, 567 (1996) arose from the testimony of a psychologist relating to the concept of "suggestibility" or "altered memory state" affecting the credibility of child sexual abuse victims. *Rouse* was decided before *Kumho Tire,* but its analysis was not inconsistent therewith. Unlike the case at bar, the Eight Circuit found that there was ample support for the testimony in the psychological literature. Davidson, the so-called expert in the case at bar could not point to any scientific literature which supported his proffered testimony. In *Rouse* the psychologist did not attempt to testify about any ultimate issue in the case, whereas in the case before this Court Davidson proffered testimony which was directed at ultimate issues. Davidson's proffered testimony was properly discounted as wholly conclusory by the District Court and by the Sixth Circuit after *Daubert* review , because the testimony was not supported by any scientific literature or any other method of verification.

There is simply no conflict between the Eight Circuit opinion in *White* and the Sixth Circuit decision below in this case. Because petitioners have not provided any compelling reason to grant this petition it should be denied pursuant to Supreme Court Rule 10.

CONCLUSION

Petitioners have failed to identify any compelling reason to grant the Petition. The cases cited by petitioners are not indicative of any conflict between the ruling of the Sixth Circuit and the decision of other United States Courts of Appeals or with this Court concerning the requirements of *Daubert* and *Monell*. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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